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SEAMEN'S WAGES.

We have been requested by several members of the Bar to give a place to the case of the Niphon, a report of which follows. Notwithstanding its length, we have consented to do so. We are aware, also, that several of our readers have objected to the too frequent publication of admiralty cases. But, nevertheless, the importance of the question here discussed is so great, and the researches of the libellant's counsel are so thorough, and, withal, so valuable to many who are interested in this branch of the law, that we must crave the indulgence of our patrons for the insertion of the case. We are also informed that the argument for the libellants will not appear in the reports of the Circuit Court, and we are anxious to do all in our power to preserve this valuable reading in admiralty law, although we do not feel called upon in any way to question the correctness of the decision of the Court, and are unwilling to be thought to

reflect in any degree upon the learned Judge who presides over its deliberations.

Recent American Decisions.

Circuit Court of the United States, Massachusetts District, October Term, 1849.

The Niphon's Crew.

The maxim, "Freight is the mother of wages," affirmed.

The crew of a ship, abandoned at sea, and set fire to by order of the master, who were upon monthly wages, cannot recover wages up to the time of abandonment, although the vessel, freight and earnings, be fully insured, and certain articles (for which the crew received a compensation in the nature of salvage) were saved.

This cause comes up by appeal from the decree of the Judge of the District Court dismissing the libel. The suit was *in personam*, for seamen's wages, against the owners of the ship Niphon. The libellants were mariners of said ship, on a voyage from the Sandwich Islands to Nantucket, on monthly wages. The vessel sailed on the 5th August, and was abandoned at sea on the 13th January, off the coast of the United States, on account of a dangerous leak caused by perils of the sea, and was set fire to by order of the master. The crew were taken off by another ship and brought into port, bringing with them the chronometer, certain charts, the compasses, certain sails, and the boat. The owners had a full insurance on the vessel, her freight and earnings. The libellants, eight in number, claim wages to the amount of $50·15 each, being up to the time of abandoning the vessel.

The respondents, the owners of the vessel, appeared and gave stipulation, and agreed to submit the question to the Court, upon the argument of the counsel for the libellants, the libel being taken *pro confesso*, and the following additional facts being agreed, viz.: the chronometer and

charts were sold for $50, of which sum the libellants have received their share. The other articles saved are retained by the owners of the vessel that took off the crew, who claim them as a gift from the master of the Niphon, and for salvage.

The District Court, after a hearing, dismissed the libel; and an appeal was taken thence to this Court.

Richard H. Dana, Jr. for the libellants.

To disembarrass the case, we will, at first, treat it as one of total loss of ship, cargo and freight, by foundering at sea, the crew performing duty faithfully, but able to save nothing. Are the owners personally liable for the wages?

The general principle applicable to contracts for labor, is that compensation follows the faithful performance of duty. If wages are not due here, it is owing to an exception peculiar to the seaman's contract for wages. Judge Ware, in the *Dawn*, (26 Am. Jur. 226,) says, "Upon the common principles of the contract of hiring service and labor, the title of the laborer to his reward depends on the faithful performance of the service for which he is engaged, and is not liable to be defeated by the accidents of fortune." So, Judge Sprague, in the *Massasoit*, 7 Law Reporter, 526.

We are here met with the maxim, "Freight is the mother of wages." There is nothing in jurisprudence more remarkable than the history of this maxim, its uncertain origin, its precarious life, and its lingering but certain death. It is not found in the codes or commentaries of continental Europe, nor did it originate in the Admiralty Courts or treatises of England or America. It is first discovered in the English Common Law Reports, among *obiter dicta*, though even there it has never been decided that the converse of the maxim is true, viz., that where there is no freight there can be no wages. When the early editions of Abbott on Shipping were published, there had been no decision to that effect, (Abb. on Shipp., 3d edit., p. 435); and Lord Stowell, in deciding the case of the *Neptune*, (1 Hagg. 232,) says, "It by no means follows, universally, *e converso*,

that where no freight is due, no wages are due." The English Common Law cases turned chiefly on the wording of the contracts, which were almost always so contrived, by the masters and owners, as to make the wages depend upon the safe arrival of the vessel at specific ports. *Appleby* v. *Dodge*, (8 East 300); *Cutler* v. *Powell*, (6 T. R. 320); *Hernandez* v. *Bowden*, (3 Burr. 1844.)

In the American cases there is a good deal of confusion, arising from a mistaken deference to this maxim. Judge Kent held that wages were lost with freight, and where cargo only was saved by the seamen, and no freight was due, he considers that they are to have salvage and not *Dennett* v. *Tomhagan*, (3 Johns. R. 156); 3 Kent's Comm. 195. Judge Peters, on the other hand, in the case of the *Catherina Maria*, (2 Pet. Adm. 424,) gave wages, as such, when the vessel and freight were lost, but the crew saved portions of the cargo. Obliged to admit that the crew had no lien on the cargo for wages, where no freight was due, he puts the case on the ground of contract services entitling them to the contract compensation. And again, in the case of the *Cynthia*, (1 Pet. Adm. 205,) he speaks of seamen as entitled to wages out of the "vessel *or* cargo saved," though freight is lost, provided they did their duty in saving as much as possible. In the case of the *Cato*, (1 Pet. Adm. 54,) however, he says that "freight and wages are lost by the wreck," and that the seaman, by doing his duty in saving vessel or cargo, "in a new character, as a salvor, regains a rightful claim to wages." He distinctly states the rule to be that cargo as well as vessel are pledged for this new species of salvage wages, lest the crew should neglect the cargo; but he cites no authority for the distinction. Judge Hopkinson, in the *Sophia*, (Gilpin 77,) where the cargo and freight were lost, and portions of the wreck were saved by the crew, gave wages, *eo nomine;* but he said that the wreck dissolved the contract, yet that if materials of the vessel are saved by the meritorious exertions of the crew, the claim for wages is revived. So in the case of the *Hercules*, (Gilpin, 184,) he gave wages as such.

Judge Story, in the *Saratoga*, (2 Gallis. 187,) said, *obiter*, that in the case of freight lost and materials of the vessel saved, the crew had wages, as such, and not salvage. He afterwards had occasion to examine the question more fully, in the case of the *Two Catherines*, (2 Mason, 319.) In that case the cargo and freight were lost, and materials of the vessel saved by exertions of the crew. Judge Story unfortunately deferred to the supposed rule, and held that wages as such could not be given, but gave wages in the nature of salvage, saying, however, that "If the question were entirely new, it might, perhaps, be more consistent with the principle of the rule, that the earning of wages shall depend on the earning of freight, to hold that the case of shipwreck constituted an exception from the rule, and that the claim to wages was fully supported by the maritime policy on which the rule itself rests."

The question first arose in England, in the case of the *Neptune*, (1 Hagg. 227,) before Lord Stowell. In that case the cargo and freight were totally lost, and materials of the vessel saved by the crew. After full arguments, this learned Judge, better acquainted, probably, with the ancient and modern civil and maritime law than any Judge who has presided in Admiralty in England, in an elaborate opinion, decided that wages *as such* were due. He holds that the seaman is obliged by *his contract* to save and guard the wreck, and is to receive wages not for these particular services in saving, but for having fulfilled his contract. He says, "In performing that duty he assumes no new character, he only discharges a portion of that covenanted allegiance to the vessel, which he contemplated and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages." Judge Story afterwards approved of this doctrine, and says, in a note to Abbott on Shipping, (p. 752, edition of 1846,) with reference to the *Two Catherines*, "The Court then thought that the rule upon the authorities had not been construed as liable to such an exception, and therefore put the allowance of wages in cases of shipwreck on the grounds of a

qualified salvage." See also *Pitman* v. *Hooper*, (3 Sumner, 60.)

The next case was that of the *Massasoit*, in this district, (reported in 7 Law Reporter, 522.) That case was precisely like the *Neptune*, except that the materials of the wreck were not, in point of fact, saved by the crew. The wreck occurred in winter, under distressing circumstances, and for two days the seamen were unable to perform any salvage services, and the wreck was taken in charge by agents of the underwriters. Judge Sprague sustained the doctrine of the *Neptune*, and held that it was enough if the crew were willing to aid in saving and guarding the materials, being prevented by sickness, or by the act of the owners in procuring other aid and dispensing with their services.

The next case was that of the *Reliance*, (2 Wm. Robinson, 119.) There was a total loss of cargo and freight, and the vessel perished, and the crew in her. The suit was brought by the administratrix of a deceased seaman against the owners personally. The counsel for the defence distinguished the case from that of the *Neptune*, by the fact that no part of the vessel was saved. The learned Judge admitted the distinction, but shows clearly that Lord Stowell did not put the case of the *Neptune* on the ground of salvage services, but of faithful performance of contract. He states that portions of the wreck of the *Reliance* were saved by strangers, and had come into the owner's hands, but were not and could not have been saved by the crew. He decreed wages to the time of the death.

The rule which made wages depend on the earning of freight may now be considered as overthrown. In the case of the *Neptune*, materials of the vessel were saved by the efforts of the crew. In the case of the *Massasoit*, materials of the vessel were saved, but not by the crew, they, however, being ready to do all in their power; and the proceeding was *in rem*, to enforce a lien. In the case of the *Reliance*, not only was the saving of materials done by strangers, on a foreign coast, but the crew perished before salvage services could be rendered. These decisions bring

the rule precisely to the case now in hearing, except that (as we have assumed) no materials are saved. *Is then the fact of the accidental saving of a few materials by strangers, the vessel being specifically destroyed, and the enterprise entirely defeated, essential to the personal obligation of the contract on the owners?*

It may be remarked, that there is nothing in the language of the Court, nor in the decision, in either the *Reliance* or the *Neptune*, indicating that the fact of salvage being made is essential. On the contrary, the reasoning is all such as would make the contract mutually obligatory, whether materials were saved or not. In the case of the *Reliance* it cannot be supposed, for a moment, that the liability of the London owner to the representative of the deceased seaman, depended on the fact that a stranger on the French coast picked up a few dollars' worth of old iron, or a spar, accidentally thrown ashore, perhaps days after the crew had perished.

The reasoning in the case of the *Massasoit* would extend over this case, but as the proceeding was *in rem*, the personal liability was not considered.

Let us, then, examine the only proposition which can prevent our recovery. It is this: if a vessel is destroyed, freight and cargo lost, and the enterprise defeated, yet seamen are entitled to wages for the voyage if they have performed their duty, although they have saved nothing, *provided some portion of the wreck happens to be saved by other means.*

No one will pretend that such a rule is founded in natural justice. No case can be found in any book where it has been laid down; nor is it in the code of any nation, ancient or modern. Neither is it founded on any sound rule of policy. The reason given for the supposed rule of freight was, in the words of Judge Ware, to "make the right [to wages] dependent on the successful issue of the enterprise, for which the men are hired," and of Judge Sprague "to unite the interest of the mariner with that of the owner." It will be found, too, on examining the codes of European

nations, that wherever they have introduced this exception to the law of hiring, it has been in such a way as to identify the interest of the seaman with that of the employer, depriving him of wages if the enterprise failed. Wherever they have refused wages, they have also dissolved the contract; and whenever they have given compensation from the wreck, it has been in consequence of salvage services actually performed by the seamen.

In order to gain all the light possible on this subject, I have examined carefully that treasury of the maritime laws of all ages and nations, Pardessus' Lois Maritimes, and a careful reading of this work shows how little foundation there is in history for this odious exception. There is no trace of a rule making seamen's wages dependent upon the success of the voyage, in the laws of the Rhodians, or of the Roman or Greek empires, nor in the codes adopted by the Crusaders for the government of their conquered countries in the East. It is not to be found in any of the Italian Commonwealths, whose commerce filled the world, in the middle ages. That universally received standard of Maritime law, the Consolato del Mare, shows no trace of it. Judge Ware, in the case of the *Dawn*, (26 Amer. Jurist, 226,) says, "No trace of such a principle is to be found in the Roman law, nor in the Maritime Legislation of the Eastern Empire, nor in that ancient compilation which goes under the name of the Rhodian laws. It owes its origin to the necessities and peculiar hazards which maritime commerce had to encounter in the middle ages, when to the danger of the winds and waves were added the more formidable dangers of piracy and robbery."

The laws of Spain, Ordonnance Maritime de 1340, Art. 17, (5 Pard. 357,) provide that in case of wreck, the seamen shall aid without loss of time, in saving the ship, her furniture, *cargo and merchandise on board.* "Dans ce cas, les matelots et autres employés doivent recevoir leur loyers, jusq'au moment ou le patron leur dira de cesser leurs fonctions." But if they shall desert and not aid in saving ship and cargo, "nonseulement le temps qu'ils auront servi ne

leur sera pas compté, mais encore ils devront rendre ce qu'ils auront reçu pour avances ou paye." It also provides that any seaman who shall refuse to aid in saving, shall be imprisoned until he repays his advanced wages.

The laws of the Hanse towns are as explicit as those of Spain. The Recès de 1434, Art. 3, (2 Pard. 474,) treating of wreck, provides as follows: The seamen are bound — "seront tenus" — not to leave the master without his permission, but to aid in saving the ship and cargo, and to remain by him so long as he furnishes them support, and for their labor they shall receive a just salvage compensation, according to the circumstances, *as well as their wages and venture*, conformably to the law of the sea — "un juste salaire de sauvetage, suivent les circonstances, ainsi que leurs gages et portées conformément au droit de la mer."

The next ordinance of the Hanse towns, that of 1591, (2 Pard. 520, Art. 45,) repeats the obligation of the seamen to remain and aid in saving both vessel and cargo, for which it provides they are to receive a proper compensation; but if the master has no money, he shall return them to the place where they shipped, if they wish to follow him. If they do not assist, he is not bound to pay them their wages, nor any other compensation, — as translated by Pardessus — "il sera dispensé de leur payer leurs gages ni aucun autre salaire." The ordinance of 1614, Tit. 4, Art. 29, (2 Pard. 543,) is to the same effect, except that it adds imprisonment in case of failure to aid in saving. In the same ordinance, (Tit. 9, Art. 5,) there is a provision which is somewhat doubtful. It is as follows: "If enough of the wreck is saved to pay the wages of the crew, the master shall be bound to pay them in full." As there is nowhere in the laws of the Hanse towns an intimation that wreck forfeits the wages, but on the contrary (*supra*, Recès de 1434, Art. 3,) and the obligation to labor is clear, we must suppose that this provision relates to the right the crew have to be discharged and paid off on the spot, when their services are no longer needed, provided the master has the means of doing it; and does not imply that the owners or merchants, or

even the master, are absolved from their obligation to pay finally. It is like the provision of the Hamburg Code of 1497, (Art. 21,) that when a master sends home a seaman, without fault on his part, he shall pay him half his wages. See also Ord. of Ph. II. below.

The law of the Netherlands is explained by the ordinance of Philip II., in 1563, (4 Pard. 84,) Art. 12. In case of wreck, "The seamen are bound to aid the master in saving the *cargo*, to the best of their ability. In which case, and in any other, the master is bound to pay them on the spot, if he has money, what he owes them for their *wages*, and shall *also* pay them, on account of the merchandise saved, a reasonable salvage compensation. If he has not money enough to make this payment, he shall send them to the place where the ship belongs."

The law of Genoa, decree of 1441, (4 Pard. 519,) ch. 94 and 99, makes it the duty of seamen to labor after as well as before the wreck, and obliges the master to pay them double their contract wages while they are employed in salvage services. The law of the States of the Church, Statutes D'Urban, rub. 33, (5 Pard. 144,) inflicts the punishment of banishment and loss of a hand upon a sailor who deserts his ship in time of wreck, and makes it his duty to labor in salvage, "aider au sauvetage," for fifteen days, if required. The "Us et Coutumes D'Olonne," Part 1, Art. 22, (6 Pard. 553,) after requiring the seamen to remain and labor, require the master, when he dismisses them, to give them a written discharge, "in order that they may prove to the owners of the ship that they did not leave without permission."

The following are believed to be all the passages relating to this subject in the laws of Hamburg, Lubec, West Capelle, Wysburg, Riga, and Denmark. In examining these passages, the Court will be struck with certain facts. It is nowhere stated, in terms, that the contract is dissolved or that wages are lost by the wreck. Nor is the contrary stated. But, in this silence, which way should the presumption be? Can there be a question that it should be in

favor of the general principle, rather than of the exception, especially when the exception is contrary to natural equity, and admitted to have had no place in the laws of earlier days, and of other great commercial nations of the same day? It will be observed, too, that these codes distinguish between wages and salvage, and recognize no principle like that of wages in the nature of salvage. Where salvage is given, it is irrespective of prior earnings, but is given for actual salvage services, *pro opere et labore*, according to the circumstances of each case. And no distinction seems to be made between vessel and cargo, as respects either the duty of the crew to save, or their right to wages, or the allowance of salvage.

Hamburg. Decree of 1603, (3 Pard. 385,) tit. 17, Art. 1. In case of wreck the crew are bound to aid in saving cargo and materials, receiving an equitable compensation; if they refuse their assistance, the master shall pay them neither their wages, nor any thing else: "le patron ne leur paiera ni loyers ni rien autre chose." The same article is found in the decree of 1497.

Lubec. Third Code, published by Brokers, Art. 295, (3 Pard. 418.) "In case of wreck the seamen are bound to aid the merchant in saving his cargo, as much as is in their power, and they shall receive a just compensation; provided, that if they cannot agree with the master and merchant, it shall be decided in the first Hanseatic town at which they arrive, or at the first place in which there is a Chamber of Commerce, and they shall be paid, each according to his desert, by the master and merchant present at the wreck. He who has not labored in salvage shall receive nothing."

Ditto, Art. 305, (3 Pard. 422,) inflicts a punishment of two months' imprisonment on any seaman who refuses to assist in saving from the wreck; and branding, with three months' imprisonment for the second offence. The Ordinance of 1542, Art. 24, (3 Pard. 431,) inflicts the penalty of death.

Ordinance of 1586, Tit. 3, Art. 3, (3 Pard. 444.) "In

case of wreck, the master and crew are bound to aid, to the best of their ability, to save the goods of the freighter, who shall be bound to pay them equitably for their labor, according to the advice of arbitrators. But if the freighter and the crew cannot agree upon the amount of the compensation, it shall be decided at the first Hanse town at which they arrive, or the first place where there is a Chamber of Commerce; and each one shall be paid according to his desert. Whoever has not labored, shall receive nothing, and in addition thereto his wages shall be forfeited."

West Capelle. Judgment 3, (1 Pard. 372.) "If a ship is wrecked in any country whatever, the crew are bound to save and guard the cargo to the best of their ability. If they have assisted the master, to the best of their ability, in saving the cargo, he is bound to pay them, ['shuldig hen loon te geven,' which Pardessus translates, 'est tenu de leur payer salaire,'] and if he has not the money to pay them, he must take them home. If they do not aid, he owes them nothing, and they lose their wages as the ship is lost."

Riga. Statute of 1672, Tit. 5, Art. 1, (3 Pard. 522.) In case of wreck, — "the crew are bound to aid, (in saving the cargo,) on pain of losing their wages; and they shall have a reasonable compensation for their labor in making salvage."

Denmark. Code of Fred. II., 1561, Art. 24, (3 Pard. 250.) "In case of wreck, the master and crew are bound to save the ship and her furniture, as well as the cargo, and compensation shall be made them by the decision of arbitrators. On the other hand, the freight of the cargo saved, as well as the wages of the crew, should be paid *pro rata itineris*, according to the decision of arbitrators. The seaman who will not aid in saving ship, furniture and cargo, shall lose his wages, even the advance which he has received, and he shall be regarded by all seamen as infamous."

Ditto, Art. 52, (3 Pard. 259,) establishes the rule that in case of partial loss of cargo, the crew shall not receive their

entire wages, but according to the amount of cargo saved, in the proportion of the freight which the master receives.

The Code of Christian V., 1683, Ch. 3, Art. 1, (3 Pard. 288,) is the same with that of Fred. II., cited above. But the same Code, Ch. 4, § 8, (3 Pard. 298,) enacts that "If the cargo and materials of the vessel saved, deducting charges of salvage, is not sufficient to pay the wages of the crew, they shall demand nothing farther."

Wysburg. Laws of, Art. 17, (1 Pard. 471.) "In case of wreck, the crew are bound to save the cargo to the best of their ability. If they aid the master in saving, he owes them their wages. If he has no money, he may pledge the cargo saved, to return them to their own country. If they do not aid him in saving, he owes them nothing, and they lose their wages." Some editors add, "in the same manner as the ship is lost."

It will be seen that none of these codes give any countenance to the doctrine that in case of wreck, seamen are to get no wages except from the materials of the vessel. And the only code which seems to make the wages depend upon the amount saved, that of Denmark, subjects the cargo to the lien for wages, which has never been done in this country, and it denies the principle of *Pitman* v. *Hooper*, that wages in full are to be given, if sufficient freight is earned to pay them.

The law of Sweden, Statute of Wysburg, A. D. 1254, Ch. 12, (3 Pard. 120,) established the rule that if half freight or less was earned, in case of wreck, the seamen should receive half wages; if more than half freight, whole wages. A later statute, that of Charles XI., 1667, Part 5, Ch. 2, (3 Pard. 170,) is the first we have yet seen which establishes the rule of obtaining wages only from the materials of the vessel. "When the ship and cargo are totally lost, the master and crew can demand nothing of what is due them. But if they save materials to the amount of their wages, they shall be paid in full."

There is no question that the law of France establishes, by positive enactment, the exception we contend against,

The ordinance of 1681, Lib. 3, Tit. 4, Art. 8, (4 Pard. 365,) enacts, "En cas de prise, bris et naufrage avec perte entiere du vaisseau et des merchandises, les matelots ne pourront pretendre aucuns loyers, et ne seront neantmoins tenus de restituer ce qui leur aura esté avancé." Article 9 enacts "If any part of the vessel is saved, the seamen engaged for the month or voyage shall be paid their wages earned from the materials they have saved, and if cargo only is saved, they shall be paid their wages by the master, in the proportion of the freight which he receives. And in whatever way they are hired, they shall, in addition, be paid by the day, for their labor in saving the materials." The French Code follows the ordinance of Louis XIV. See Vol. 18, p. 278, Art. 259, et seq.

The French commentators have consistently held that the wreck dissolves the contract, and that the seamen are not bound to labor in saving vessel or cargo. Valin's Comm. on the Marit. Ord., Vol. 1, p. 704; *Pothier, Cont. Marit.*, No. 127, *Boulay Paty Coms. de Droit Marit.*, Vol. 2, p. 230. And the French carry this system of attaching contracts to the vessel and exonerating owners so far, that they exempt the owners from personal liability to materialmen, if the ship perishes on the voyage home. French Code, Lib. 2, Tit. 8, *Des Proprietaires*, Art. 1; Emerigon, Tom. 2, p. 458.

Article 3 of the Laws of Oleron has been cited by the French writers as containing the principle of their code. The passage is as follows: "Lorsqu'un navaire périt en quelque lieu que ce soit, les matelots sont tenus de sauver le plus qu'ils pourront des débris et du chargement. *Et s'ils y aident*, le patron doit leur payer un salaire raisonable, et le frais de conduite dans leurs pays, autant que le valeur des choses sauvés peut suffire, et s'il n'a pas assez d'argent, il peut mettre les objects sauvés en gage pour se procurer de quoi les ramener en leur pays. Si les matelots refusent de travailler au sauvetage, il ne leur est rien du, et au contraire, quand le navire se perd, ils perdent aussi leur loyers."

The meaning of this passage is matter of inference. The

French writers, trained under their code, have inferred that the wages were lost at all events by the wreck, and have construed the latter clause as only referring to the known rule. And the French writers have been the chief sources of information to our own jurists. But when we consider that such a rule did not exist at all in early times, nor in the Mediterranean, nor among nations following the Roman law; and when we remember the great influence these nations exerted on the maritime law of the North at the time the rules of Oleron were compiled, we should rather infer that the latter clause in this section was a specific recital that wages are forfeited for refusal to continue the performance of duty after wreck, in pursuance of the general principle of forfeiture for gross violations of duty. It is clear that Sir Wm. Scott, in the case of the *Neptune*, either did not give this section the French construction, or did not think it, if so construed, applicable or binding in England at the present time. Mr. Curtis, also, in his work on the Rights and Duties of Merchant Seamen, does not consider the construction as clear. Curtis's Rights and Duties, 284.

Having thus examined these foreign codes, let us see what result is obtained from them. The French code makes the wreck, with destruction of the enterprise, a dissolution of the contract. The seaman is entitled to day's wages as a salvor, and his lien upon the materials of the vessel for antecedent wages is reserved to him. This code, except so far as it is followed by that of Charles XI. of Sweden, and to some extent by that of Denmark, stands alone. All the other codes insist on the obligation of the seaman to continue his labor, (doubtless under the direction of the master,) and for the benefit of vessel and cargo alike. The French code allows him to follow his lien on the materials of the vessel if he pleases, since he has no lien on the cargo. It is a significant fact, also, that the two codes which adopt this exception are the only codes which in terms continue to the seaman his lien on the wreck of the vessel for antecedent wages. Not that the lien did not

exist under the other codes, but because it was needless to provide for its continuance when the contract remained entire.

The French principle is not adopted either in America or England (see the *Neptune*, *Massasoit*, and *Reliance;*) on the contrary, the seamen are held bound to labor under their contract; and now the declaratory act of 7 and 8 Victoria, Chap. 112, gives wages to the time of the wreck, if the crew continue faithfully the performance of their duty. See also, the Colonial Ordinance of Massachusetts, 1668, Vol. 1, p. 721, § 29. "And, in case of suffering shipwreck, the mariners are, without dispute, upon getting on shore, to do their utmost endeavors to save the ship or vessel, tackle and apparel, *as also the merchant's goods*, as much as may, out of which they shall have a meet compensation for their *hazard and pains;* and any upon conviction of negligence herein shall be punished."

If bound to labor under their contract, it must be under the direction of the master, and for the preservation of cargo and vessel alike, or for either alone, at the master's option. They may be compelled, for the benefit of the owners, to sacrifice their lien on the materials, and to labor for the cargo alone, on which they have no lien, or at most only to the extent of freight that may be due upon it.

If such is the obligation of the seaman, why is it not mutual? The owner is surely bound to furnish him food and lodging while he is laboring, and why not wages? If the contract is binding on the seaman to the extent above stated, and not binding on the owner as to compensation, it presents a most extraordinary anomaly. The French have involved themselves in no such inconsistency. There is no evidence of it in other European systems. The cases of the *Neptune* and *Reliance* were both proceedings *in personam*, as we understand the reports; and if not, the owners are required to pay on the ground of contract, and not of salvage in their possession. The whole reasoning of the Court would exclude any such illogical and unjust exception.

The idea that the contract is binding upon the seamen, but that they have no claim for wages except their lien on the materials of the vessel, (an idea which has not taken the shape of a decision since the case of the *Neptune*,) arises from not discriminating properly among the codes and systems of Europe. The European systems have been treated as a whole, and a rule found in the French code has been joined with principles and analogies from the laws of other nations, to which it is inapplicable, and a confused, inconsistent, and unjust composition made up. The publication of the work of Pardessus has thrown a new light upon the maritime systems of Europe, and shown them to have been quite variant. If we follow the French rule, we should follow it throughout; and if we follow the general rule, we must not introduce the French exceptions.

But, supposing this rule, which we contend against, was more general than we have supposed, during the Middle Ages, there are reasons why it should not be followed now. In those periods, voyages were short, ports of discharge frequent, and the wages at stake small. Now, vessels go round the world, and when they near the home port, the wages at stake are large. Then, the crew were partners in the enterprise, and had a voice in the control of the vessel and choice of the master, and often an interest in the freight. The Court is familiar with those rules which required the master to consult the crew before going to sea, or making jettison, or abandoning the wreck. Now, the crew are merely hired laborers, and have no voice in the control of the vessel. The reasons of public policy now are against the rule, as shown by the Court in the case of the *Massasoit.*

It may be said that the obligation of the owner, in the case of the *Reliance*, rests on the ground of his having received the proceeds of the wreck saved. It will be observed that the Court did not put the obligation on that ground, although there was an opportunity to do so, but on the ground of contract. And there was no allegation to that effect in the libel. Nor does it appear that the net

salvage was sufficient to pay the wages, nor was any provision made for others of the crew who might claim out of the same fund; nor any allusion to the apportionment of the fund. We would not lightly suppose the Court to adopt so anomalous a position as this; sustaining, first, a one-sided contract, all obligation and no compensation, and then reviving it by the accident of net salvage from the vessel, coming through the hands of a stranger. But chiefly we insist that no authority can be found for the position, that while seamen are bound to labor in salvage, under their original contract, and as part thereof, for vessel and cargo, either or both at the master's option, they have no claim for wages but in consequence of their lien on the materials of the vessel saved. No decision and no code has yet combined these principles. It will be observed, too, that if the claim for wages rests solely on the subsistence of their lien on the vessel, it should, on principle, exist as to all materials saved, whether by themselves or others, or saved by accident; but the two codes above referred to, those of Louis XIV. and Charles XI., the only ones that establish this rule in terms, both restrict the lien to materials which *the seamen have themselves saved;* showing that it is rather an arbitrary and local rule of policy, than the recognition of a general principle.

The only American cases that need be noticed, before closing this branch of the argument, are the *Elizabeth and Jane*, (Ware's R. 41,) and the *Dawn* (26 Am. Jur. 226.) The former case was decided before the *Neptune*, and the learned Judge, like Judge Story in the *Two Catherines*, supposed the rule to be, that wages depended upon the earning freight; or, as he states it on p. 44, that "Wages are dependent on the successful termination of the voyage;" "any misfortune that destroys the voyage, puts an end to the claim for wages. *The contract is dissolved.* The connection of the crew with the ship is at an end. The property is derelict," &c.; and again, on p. 42, "Wages are dependent on the safe delivery of the thing." It is enough to say that this doctrine is overruled by the later

cases. It will be observed, too, that the learned Judge had not then access to the collection of European codes since made by Pardessus, and relied chiefly on the French code and the French construction of the Roles of Oleron; yet even from that point of sight, he admits the confused and unsatisfactory state of the law.

The case of the *Dawn* was decided after the *Neptune*, but before the *Massasoit* and *Reliance*. In that case the wages were paid to the time of the wreck, and the only question was, whether salvage could be given in addition to wages. The learned Judge takes up, *obiter*, the general question of wages in case of wreck, and while he yields the groundwork of his decision in the *Elizabeth and Jane*, to the authority of the *Neptune*, yet he seems to retain all that the *Neptune* does not necessarily overthrow. We can only say that, had the point been before him for decision, we have no doubt he would have gone more fully into the considerations of policy that govern the question, and examined more minutely the European codes on that point. As it is, it is evident that he repeats so much of the old doctrine as was not then overturned, and does not sufficiently consider the position in which the connection of the two systems, the new piece in the old garment, leaves the entire fabric.

We have, thus far, assumed this to be a case of total loss. But it appears that a boat, chronometer, compass, and some charts were saved by the crew, and brought into port. Their services and duty, therefore, continued after the wreck. There is no doubt, upon the principle of the *Massasoit* and *Reliance*, that the crew were bound to guard these relics, and deliver them in safety to the owners; and, in performing this duty, they were under the master's control. The contract and its obligations survived the wreck.

But, if the seamen have wages only on the ground of materials which have come into the owners' hands, it is to be observed that the fund is not exhausted. These libellants have received only their share of the $50 obtained from the sale of the chronometer and charts. Are they not

entitled, as first claimants, to exhaust the fund? Moreover, there is property to the value of $100 in the hands of the owners of the ship which took off the crew, who make a claim upon it as a gift from the master, and for salvage. If the master has given it away, should not the owners make it good to the crew? If it is held for salvage, must not the owners discharge the claim and pay, at least the net, to the crew?

In this case the master ordered the crew to leave and set fire to the ship. This shows the hardship of continuing the authority of the master, yet leaving to the seaman only his lien. If there is such a rule, the crew had a right, if they chose, to stay by the ship. At least, on the principle of lien, they would be entitled to enforce their lien if the vessel had been brought in by others, and their leaving was compulsory. The act of the master cut them off from both these chances of saving their wages.

The owners have also, in this case, an insurance on vessel, cargo, and freight. I am aware it was formerly held that this could not inure to the benefit of the crew. But this doctrine was on the hypothesis that the wages were attached to the success of the enterprise. If this rule is abandoned, and the principle is adopted, that the owners are liable for wages after wreck, in consequence of proceeds of the wreck received, why should not this include insurance on vessel and freight? In either case, it is the fact that the owner has a fund to pay from, that makes him liable, and in either case, the owner may resist payment by showing that the seaman did not faithfully perform his duty at the time of the wreck. But the reason of public policy, which forbids seamen from insuring their own wages, still subsists, for the master and owners cannot then be parties to resist the claim for wages, to show misconduct or negligence, or to make offsets. In the present state of the law, then, we submit that while seamen should not be permitted to make an independent insurance of their wages, yet if the owners have insured vessel or freight, meritorious seamen should be paid their wages out of that fund.

WOODBURY, J. In this case, as no freight has been earned, it is well known that the general rule is, no wages are to be paid. Molloy, 245; 1 Siderfin, 228; 2 Shower, 291; 3 Salk. 23; 3 Hag. Ad. 96. But there are various exceptions to this as a general rule, and the chief inquiry is, whether, on the facts of the present case, it can be brought within any of those exceptions.

The important principle, on which the rule rests, shows the ground of most of the exceptions. It rests on the idea, that if a cargo be on board to be carried safely and saved in peril, the crew should be induced to use all possible exertion to save it, by making their wages in such a case depend on its being actually preserved, and thus freight earned on it. Hence originates the quaint maxim, that "Freight is the mother of wages." Some have incautiously added, it is "the only mother of wages." If it was the only one, there is no ground whatever for the present libel, as it is not pretended here that any freight whatever was earned.

What then are the other sources or reasons for wages beside earning freight?

They seem to me to rest on service performed, and an inability to earn freight, in consequence of some wrong or neglect by the owner or his agents.

In such cases, the owner should not take advantage of his own misfeasance or nonfeasance; and the sailor, performing his whole duty so far as regards his own exertions, and successfully, should be compensated.

A brief retrospect of some of the exceptions to the general rule, will show whether the present case can be brought within the principles, which govern them; and also whether any of them go further than I have suggested, and, as is contended here for the libellants, make the owners liable for wages on the contract of hiring and ordinary service alone, without reference to the conduct of the owner or the saving of any part of the freight or vessel when in peril.

Among the exceptions, where wages are allowed, though

no freight is earned, is where no cargo is put on board so that freight might be earned. Not earning it, then. is the neglect or fault of the owner; and consequently such a case constitutes one of the exceptions to the general rule. See cases, *post*, and Edwards, Ad. 118, 119,; Curtis on Seamen, 271, 284, 287; Laws of Wisbuy, Art. 17; 3 Hag. Ad. 202; 2 Ib. 158. This rests not merely on the original contract as the mother of wages, but on the service and freight not earned by the misconduct or act of the owner, and of which he is estopped to take any advantage.

It would be making the exception the general rule, to hold the contract in all cases to be the mother of wages, unless you considered it an implied portion of every contract of this kind, that it should be so performed, when a cargo was on board, so as to earn freight. Then the contract might well be regarded as the general source of wages, and still the same result follow as if freight was so regarded.

As an exception, owing to carelessness of the owners, or the case at times coming within the general rule of some freight earned, they are personally liable for wages when the vessel and cargo have been condemned, and their proceeds restored at some subsequent period. *Sheppard et al.* v. *Taylor et al.*, 5 Peters, 699, 711.

No matter whether the vessel and cargo are restored, or their proceeds, after condemnation, as the lien which before existed for wages "*reattaches to the thing, and to whatever is substituted for it.*" 5 Peters, 710; *Pitman* v. *Hooper*, 3 Sumn. 50, 287.

In several other classes of cases, though no freight is actually earned, this circumstance is attributable to the owners, rather than the crew, and then the latter are not to bear the loss of wages. They may then be recovered of the owners, if, for instance, the latter are guilty of a wrongful deviation from their contract or voyage before the loss, or guilty of a contraband trade, or of driving the crew away by cruelty, or engaging without their previous knowledge and consent in any illegal voyage; or by running in

debt, and subjecting the ship to payment of it. 1 Hag. Ad. 238; 5 Peters, 687; Edw. Ad. 122; 2 Hag. Ad. 158, *Case of the Martin;* 2 Gall. 175. In short, wages are payable whenever freight is lost by the fault or fraud of the master or owner. 3 Kent, Com. 187; *Hoyt* v. *Wildfire*, 3 John. 518. *The case of the Martin*, 2 Hag. Ad. 158; 2 Peters, Ad. 261; Cowen, 158. But here, as a cargo was on board, and it was here impossible to earn freight, and there was no interposition or neglect, or other misconduct by the owners to prevent the carrying of freight, the general rule applies in full force, not to pay wages without it. And no statute exists here making an exception; and no exception, by adjudged cases, has been referred to, or can be found, which reaches the circumstances of the present case, unless a part of the vessel was saved by the exertions of these libellants, so as to entitle them to wages in the nature of salvage.

Having considered the established exceptions to the general rule, and seen that none of them, or the principles of them, apply to the present case, I will now proceed to the inquiry,—how, on principle or precedent, the saving of a part of the vessel can entitle a crew to recover wages, though freight was entirely lost by the loss of the cargo on board, and though no misbehaviour or neglect occurred on the part of the owners to produce the loss.

There has been, to be sure, in modern times, an increased tendency to allow wages, but it should be when it can be done without weakening the principle, that takes the lead in and governs this subject. Thus, if wages are due because part freight has been received, or earned, or part of the cargo has been saved, so as to earn some freight, however small, full wages must be paid. 3 Sumner, 50; 3 Hag. 199; 2 Wm. Rob. 52.

Some cases seem to hold (*Reliance*, 3 Hag. 19, 58,) that the owner is, in case of part of the cargo saved, not only liable, but that the seamen may proceed against the cargo itself. This last is very doubtful, however, unless the cargo was owned by the person who owned the vessel.

Again, where, in a round voyage, freight has been earned out, and not back, the law is indulgent so as to pay wages out of it; and such is the rule also when freight has been separately earned to intermediate ports, at which the vessel touches on her way out or home. 3 Hag. 201; 1 Ib. 232. Or, at times, it is allowed to the last port of discharge, and half the time running there. *Thompson* v. *Faucett*, 1 Peters, C. C. 182, 207; *Pitman* v. *Hooper*, 3 Sumn. 50, 286, 295, and cases cited; *The Juliana*, 2 Dod. Ad. 504; Abbott on Shipp. 749; Gilpin, 606; Curtis on Seamen, 267; 2 Mason, C. C. 319; 3 Greenl. R. 1; 1 Keble, 831; 3 Salk. 23. All clauses to the contrary, in the shipping articles, are likewise considered void, from regard to the confiding sailor, so much the ward of a Court of Admiralty. 2 Dod. 504; 3 Kent, 6, 194, 195; 6 Wm. 4th, ch. 19, sec. 5; Edw. Ad. 119; 3 Sumner, 50.

In some countries, by statute the law has of late been expressly altered, and wages required to be paid, though the cargo and ship be lost, and no freight earned, if a certificate be obtained from an officer that the crew did their duty faithfully to save the vessel and cargo. Edw. Ad. 123; 7 & 8 Vict. ch. 112, sec. 17.

But here no such statute exists, though one might not be unjust, where the weather-beaten sailor proves true to duty to the last, and more especially if the owner has, as here, insured his freight.

Having no such statute here, our power to consider it so, standing with or without insurance of freight, is too questionable for justifying the adoption of such a course without legislative sanction, after the pursuit of a different course for ages.

In the *Lady Durham*, (3 Hag. 201,) Sir John Nicholl refused to do it, unwilling, as he said, "*to violate a principle and rule of law, whatever may be the hardship on the seaman.*" The Court there declined to pay wages out of the insurance of freight by the owner, where freight was not earned, nor prevented by the owners.

How can the saving of a part of the vessel change any

of these principles? The wages were not stipulated to depend on that, nor did the ancient usage make them depend on that, when it was the cargo or freight saved or secured, which was to secure wages, and not the ship.

To be sure, when wages were earned by earning freight, or failing to earn it only by the neglect or fault of the master, the crew could resort to the vessel, even to the last nail or plank, for payment. 1 Peters, Ad. 187, note; 7 Taunt. 319; 2 Gall. 175; Edw. Ad. 121, 128; *The Neptune*, 1 Hag. Ad. 233 – 239.

So they could resort to the freight when obtained, as a fund liable to them, and so to the owners who employed them, if wages are earned. But the lien or remedy does not usually extend to the cargo itself, neither to the cargo or its proceeds, as they belong usually to a different person. *The Rigby Grove*, 2 Wm. Rob. 59; Ib. 713; Edw. Ad. 119. See Act of Congress, 20 July, 1790; *The Lady Durham*, 3 Hag. Ad. 200.

And if the cargo be owned by the owners of the vessel, and it is safely carried to its place of destination, freight is virtually earned, though not *eo nomine*, and wages are justly due within the principle of the general rule. 3 Kent, Comm. 149.

But the vessel, as a security and a remedy for wages otherwise due, — and not as a mother or cause of wages, if saved, — is also looked to in all countries. Curtis, Seamen, 313; *The Eastern Star*, Ware, 186. The error seems to me to have been, in some cases, to regard the vessel, when saved in part or in whole, as giving a title to wages; when it is freight earned, or prevented by the owner from being earned, which consummates the title, and the vessel saved furnishes merely some additional security for payment, and in some cases means of rewarding exertion by salvage.

Thus, in modern times, if only a small portion of the ship be saved in a shipwreck, it has been subjected towards the claims of the crew in the form of salvage, though no freight was earned. Curtis, Seamen, 287; 3 Kent, Com. 196; *The*

Two Catherines, 2 Mason, C. C. 334; *The Saratoga*, 2 Gallis. 164.

But in such case the crew must have continued by the wreck, and contributed to save it; and the allowance is not on the old contract or hiring, but on this new service. *Lewis* v. *Eliz. & Jane*, 1 Ware, 41; *Adams* v. *The Sophia*, Gilp. 77, 134; *The Reliance*, 2 Wm. Rob. 121. Sometimes it is treated or talked of as a receiver of wages in consequence of great fidelity, though no freight is earned, but this seems a misnomer. It is merely salvage and not wages; but whether paid as salvage or wages, it does not extend beyond the value of what is saved. *The Neptune*, 1 Hag. Ad. 237; 3 Mass. R. 563; 7 Law Reporter, 532; *The Dawn*, 26 Am. Jur. 226.

It was held in the case of *Taylor* v. *Ship Cato*, (*Semble*) 1 Peters, Ad. 54, that the crew may recover an equivalent for wages from a vessel saved by them, like salvage, and not go to the owner for it, but to the *rem*.

If all is lost, seamen lose all, salvage as well as wages. But if a part of the ship is saved by the crew, they, as a sort of partners, have the first lien on it for salvage. 1 Peters, Ad. 195, note; *The Mary*, 1 Caines, C. C. 180; 1 Dall. 392; 3 Sumner, 443.

The books speak of attaching this claim to the last plank saved. But this may at times be figurative, and not the small things of which *lex rem curat*. It should mean to embrace something of value towards payment, which must therefore be beyond mere cost and charges. Figurative or not, however, it appears better on principle if not precedent, to treat the claim as salvage, where no wages have, by the general rule, or any of its established exceptions, been earned.

The precedents on this point accord with this principle. And though some of them speak of wages as well as of salvage, yet they all agree in not extending the amount allowed beyond the value of what is saved, which is the rule in salvage and not in wages.

In *Frothingham* v. *Price*, (3 Mass. R. 553,) it was held,

that if enough of the ship was saved to equal the wages, they should be paid, though no freight had been earned. As this case cited no precedents, and gave no reasons, it would not, standing alone, be entitled to much weight. Accordingly, in *The Saratoga*, (2 Gallis. 183,) it was considered that the decision was an anomaly so far as regards wages, and could only be sustained as an allowance for salvage exertions, equal in amount and value to the wages.

Afterwards, however, in England and this country, much caution has been given to this doctrine, as to wages or salvage. In *The Neptune*, (1 Hag. Ad. 239,) the Court allowed wages to be recovered to the extent of the value of that part of the vessel saved, but no farther. 3 Hag. Ad. 202. Some cases, in the Courts of the United States, have since gone quite to the same extent. *Two Catherines*, 2 Mason, C. C. 319, 338; *Pitman* v. *Hooper*, 3 Sumner, 60, 290. See Gilpin and Ware, also, before cited.

Yet in all these, the exception must probably rest on the facts of the property being saved by the exertion of the crew, and not saved by others, and not claimed justly by others as salvage. See cases before cited.

The case of *The Reliance*, (2 Wm. Rob. 123,) is supposed by the libellants to have gone further, and to have held, that if a part of the vessel was saved by the others, the crew had a remedy against it or the owners for wages.

But though the Court there seemed very favorable to the claim made by a widow of one of the crew, and when her husband had been lost in the exercise of efforts to save this very vessel; yet they do not seem inclined to go beyond the previous case of *The Neptune* in Haggard.

And the conclusion was rested on the fact, that the deceased did in truth contribute by his exertions before his death to save a part of the vessel, though others afterwards added their exertions, and thus finished the work of saving something.

In the present case no part of the vessel itself was saved, and no special exertion shown to stop a leak, which had broken out. But the crew thereupon abandoned her, and

were taken off by another vessel. The other vessel took with them from the wreck a chronometer and certain charts, which have been sold since, and the proceeds given to the libellants; but some compasses, sails, and a boat were taken off at the same time by the other vessel, and retained and claimed for salvage as well as a gift from the master.

Considering that these articles were saved entirely by the exertions of another vessel and crew, who are entitled to salvage, and that the captain acquiesced in their taking and keeping them on that account, and that their small value of $100 would scarcely pay the cost and expenses of libelling them, it is difficult to discover any equitable or legal claim on them by the plaintiffs.

On all these considerations, cases and facts, then, the conclusion seems safest, to which the Court below arrived, dismissing the libel, and the decree there must consequently be affirmed.

Opinion of Hon. Horace Binney.

CASE OF THE HELENA.

JETTISON — GENERAL AVERAGE.

[We are enabled to lay before our readers the following valuable opinion of Hon. Horace Binney, of Philadelphia. It relates to a question of great practical importance, and one which has been recently brought to the notice of those interested in Insurance Law in this vicinity. — ED.]

IN the case of the Helena, the freight of the jettisoned goods amounted to $4949·95, and on the cargo arrived it amounted to $7845·36. The jettisoned freight therefore did not amount to 40 per cent. of the entire freight.

This jettisoned freight has been paid in full by contribution in general average, less $1657·92, which was the whole actual loss sustained by the freight, or about 14 per cent.

The adjustment made in New York, states and admits these facts, but raises a claim against the underwriters on

freight to a much larger amount, and in the following manner: The freight was valued at $30,000, and at this valuation the jettisoned freight, though by bill of lading only $4949·95, becomes $11,606. To this freight the adjustment adds the general average on freight, $1657·92, making an aggregate of $13,263·92, from which it deducts the freight on the jettisoned goods, $4949·95, which was made good by contribution, leaving the amount of loss claimed of the underwriters $8313·97.

The adjustment is supposed to be sustained by the case of *Potter* v. *Providence Washington Ins. Co.* 4 Mason, 298, which rejects *Lapsley* v. *U. S. Ins. Co.* 4 Binn. 502, and adopts in preference *McGrath* v. *Church*, Caines, 196. But neither of these cases is applicable, the question in each having been, whether jettison or voluntary sacrifice above 50 per cent. was a good cause of abandonment, and did not entitle the assured to claim a total loss in the first instance from the underwriters, and to turn them over to the other interests for the contribution due for the jettison or sacrifice. In Pennsylvania it was decided that it did not. In Massachusetts, Judge Story held that it did, as had been held in *McGrath* v. *Church*, and other cases in New York. But here the loss by jettison was not above 50 per cent., and there has been no abandonment, or right of abandonment, and the contribution due for general average is credited in the adjustment as paid to the assured, and is deducted from the loss claimed of the underwriters. The case of *Potter* v. *Washington Providence Ins. Co.* therefore does not apply.

If the *principle* of that case is deemed applicable to the extent of justifying the assured in claiming *directly* of the underwriters, the whole of the actual loss by the jettison at the valuation in the policy, instead of the amount of general average due upon the freight, I regard the settled rule in Pennsylvania, where the Union Mutual Ins. Co. underwrote the freight, and the whole current of European authority, as against that principle.

Roccus, 126, note 62; 148, note 92, says that the in-

surers are not bound to indemnify the owners for the loss of the goods, thrown overboard, but only to make good the rate of proportion which has fallen upon the assured in the contribution among all the owners of property in the ship. "*Jactu facto pro sublavanda navi, auteucantu, assecuratores ad solvendam estimationem rerum jactacum domine iprarum. Dic non beneri.*" Park and Marshall adopt this doctrine, Park saying that it is agreeable to the laws of all the trading powers on the continent of Europe, as well as to those of England. 2 Marsh. 547.

Arnold, the latest text-writer on Insurance, is still more explicit: — "The underwriters never contribute *directly* to general average losses; they are only bound to reimburse the assured their proportionate or ratable amount of the contribution. 2 Arnold on Ins. 950; 2 Boulay Paty on Emerigon, p. 6, Ed. 1827. *McGrath* v. *Church* does not notice this principle at all, nor does Judge Story in *Potter* v. *Washington Ins. Co.* Whereas the Supreme Court of Pennsylvania did expressly notice it, and follows the European law by adopting it.

If this had been the case of goods thrown overboard to save the adventure, and resulting in the safety of it, these authorities show that the underwriters would not be bound to pay directly for the goods, but for the contribution paid by the owner of the goods, — the goods themselves being paid for to the assured by the general contributions; and upon the same principle, they are not bound to pay directly the amount of jettisoned freight, but only the amount of contribution chargeable to the freight. The goods jettisoned are, by the maritime law, regarded as arriving in safety for the purpose of freight, and therefore are not lost, but as safe as the rest of the adventure. Valin says, "*les effets jetés sont supposés recoursés.*" 2 Valin, 654, du Fret. Art. 13. It is because they are supposed recovered, that the freight is supposed to be earned, and is payable in general average.

There is no authority for an adjustment of a loss of freight by jettison as a *salvage* loss. The whole analogy to a salvage loss is wanting. The loss is neither total nor

partial loss, but simply a general average. If its character of general average is disregarded, then in the present case it is simply a partial loss, the same as if 40 per ct. of the goods had been pillaged by pirates, and the rest let go. A salvage loss, in which the underwriter is without abandonment treated as taking the proceeds saved, and paying a total loss, is inadmissible in such a case.

The fact is indisputable, that the owner of freight in the Helena, will, upon being reimbursed the general average by the underwriters, receive all that he would have received if there had been no jettison; and this is all that the Union Mutual is bound to pay. The difference between the parties arises wholly from the over-valuation, which in some cases would have turned out to the great gain of the assured, but cannot in this instance.

Supreme Court of New Jersey.

The Delaware and Raritan Canal Co. *v.* Wright.

Twenty years' adverse possession, and maintaining what would otherwise be a nuisance, will give a right to maintain it; but until twenty years have established the right, every continuance of it is actionable, and damages may be recovered for any injuries done by it within six years before the commencement of the suit, although the cause of injury was erected for more than six years before.

In such cases, the damage is the cause of action, and the statute begins to run from the time of the injury, and not from the doing of the act which occasioned the injury, which gave no cause of action until damage ensued.

Error to Mercer Circuit Court. This action was, in case, for the continuance of a nuisance by the obstruction of a water-course, by means of a culvert erected by the company, the effect of which was, as alleged by narrowing the passage, in times of freshet to overflow the lands of the plaintiff. The suit was commenced in December, 1845. The culvert was erected in 1833, and had been continued from that time to the commencement of the suit. Upon the trial, before Mr. Justice Randolph, the counsel of the

company called upon the Judge to charge that the statute of limitations was a bar to the action. The Judge, on the contrary, charged the jury that the statute was no bar, but that the plaintiff was entitled to recover for all damages proved to have been sustained by him at any time within six years next before the commencement of the suit: to which ruling the defendant below excepted.

Argued before the Chief Justice, and Nevius and Carpenter, Judges.

J. S. Green, for the plaintiff in error.

The right of action was complete upon the completion of the culvert. This is not the ordinary case of a continuance of a nuisance. The company acted under the authority of the law in the erection of the culvert, and what it did was lawful. The culvert was lawfully erected, but it turned out that it was too narrow. 2 U. S. Dig. 805, tit. "Limitations," Art. 269; *Kerns* v. *Shoemaker*, 4 Ham. 331; 2 Greenl. Ev., Tit. "Limitations."

W. Halsted, cited Angell on Lim. 324, § 3; *Baldwin* v. *Culkins*, 10 Wend. 167, 175.

Opinion of the court delivered by

Carpenter, J. Every continuance of a nuisance is held to be a cause of action; and an action will lie as well against him who continues, as against him who first levied a nuisance. 3 B. C. 219; *Thompson* v. *Gibson*, 7 Mees. & W. 465; *Staple* v. *Spring*, 10 Mass. 74. Therefore, an action will lie for the recovery of and damages suffered by the continuance of a nuisance, which have accrued within six years; though it seems the right of action will be barred only by an adverse possession of twenty years. Angell on Lim. 234, and cases cited.

But supposing the building of the culvert to have been lawful, as urged by the counsel of the company, the injury merely consequential, and in such case the only statute begins to run from the time the special damage accrued. 2 Greenl. Ev. § 433; 2 Stark. Ev. 659. This principle has been well applied to acts done by commissioners and others acting under authority given by statute, in which

case there is generally a special limitation prescribed in the same statute. The act being lawful, and the action being sustained only in consequence of special damage, it has been held, that in such cases, the statute only begins to run from the time when the consequential injury occurred, and not from the time of doing the act which gave occasion to the consequential injury. *Roberts* v. *Read*, 16 East, 215; *Wordsworth* v. *Harley*, 1 B. & Adol. 391; *Gillon* v. *Boddington*, 1 Car. & Payne, 541.

There was no error in the charge of the Judge, and the judgment must be affirmed.

The Chief Justice, and Nevius, J., concurred.

Judgment affirmed.

Supreme Court of New York, in General Term, Albany, February, 1850.

Present, Justices WRIGHT, WATSON, and PARKER.

LORENZO CADWELL

v.

JAMES B. COLGATE and GEORGE W. ABBE, impleaded with WILLIAM WOODWORTH.

Where an attachment was issued against a non-resident debtor, on affidavits which were insufficient to confer jurisdiction on the officer issuing it, and after a levy made by the sheriff on the property of the debtor, the latter procured its release by executing and delivering a bond with sureties, reciting the issuing of the attachment, and conditioned as required by statute for the payment of the debt with interest, costs, &c., the bond was adjudged to be void.

Where a suit is brought on such bond by the creditor against the debtor and his sureties, the defendants are not estopped from setting up the invalidity of such bond, and availing themselves of the ground, that the proceedings under which the property was seized, were void.

THE declaration was on a bond taken under 2 Rev. Stat. (3d ed.) 72, § 57, 58. The first count set forth a proceeding in favor of the plaintiff, a resident of this State, against William Woodworth as a non-resident debtor, by attachment issued August 25, 1846, by Frederick P. Stevens,

Esq., First Judge of Erie County, Counsellor, &c. The substance of the application was set forth in due form, and the further averment, that there was attached to said application an affidavit sworn to before said First Judge on the day last aforesaid, in which it was set forth that said plaintiff then had a demand against the said Woodworth personally, arising upon a contract made in the State of Indiana, amounting to one hundred dollars and upwards; and that the said Woodworth was then indebted to the said plaintiff in the sum of $2207·72 over and above all discounts; and that the said Woodworth was not then a resident of this State, but that he then resided at Lafayette in the State of Indiana, or elsewhere out of the State of New York.

And it was further set forth in the declaration, that there was annexed to said application, another affidavit sworn to on the day last aforesaid, before the said First Judge, by John C. Hayward and Solomon Durland, respectively, who were the persons of that name mentioned in said application; in and by which affidavit last mentioned, each of said persons last named, stated and swore *that said Woodworth then resided at Lafayette in the State of Indiana, or elsewhere out of the State of New York, as each of said persons verily believed to be true*, and that neither said Hayward or said Durland were interested in said application. The declaration further averred the issuing of the warrant of attachment, and that on the same day of the delivery thereof to the sheriff of the County of Erie to be executed, said Woodworth applied to said Judge for an order to discharge said warrant; and that, for the purpose of procuring such discharge, the bond sued on was made by the defendants in this suit, and duly acknowledged and delivered to said Judge, who approved the same, and thereupon made his order discharging the attachment.

The bond was in the penal sum of $4415·44, recited the procedings before the Judge, and was subject to a condition to pay said Cadwell the amount justly due and owing to him at the time he became an attaching creditor, on account

of any debt so claimed and sworn to by said Cadwell, with interest, costs, &c.

The declaration then averred the indebtedness from Woodworth to Cadwell. To the first count of the declaration, the defendant demurred, and plaintiff joined in demurrer.

To the second count, there were pleas presenting the same facts as were set forth in the first count, and a demurrer to the plea and joinder.

A. Taber, for defendant.

N. Hill, for plaintiff.

By the Court, PARKER, J. — The defendants contend that an action cannot be maintained on the bond given to procure the release of the goods from the attachment, on the ground that the proceedings were void for the want of a proper affidavit to authorize the issuing of the attachment.

The witnesses stated in their affidavit, that the said Woodworth then resided at Lafayette, in the State of Indiana, or elsewhere out of the State of New York, *as each of said persons verily believed to be true*, &c. This was clearly insufficient to give jurisdiction. The statute requires that *the facts and circumstances* to establish the grounds on which the application is made, shall be verified by the affidavit of two disinterested witnesses. 2 Rev. Stat. 3d edit., 1, § 5. Here no fact or circumstance was stated; and it is no proof whatever for a witness to state his *belief* of a fact. A man may be able to swear to his belief, when he has no personal knowledge of the facts necessary to be established. Such testimony is never received in a Court of justice. In *Ex parte Haynes*, (18 Wend. 611,) the witnesses stated in their affidavit that they *were informed and believed* that the debtor was a non-resident, and the attachment was set aside for the want of jurisdiction; the case now under consideration is still more defective, as the witnesses do not even state their *information* on the subject. On this point the law is well settled. *Smith* v. *Luce*, 14 Wend. 637; *Ex parte Robinson*, 21 Wend. R. 672; *Kingsland* v. *Cowran*, 5 Hill, 611; *In*

the matter of Bliss, 7 Hill, R. 187; *Thatcher* v. *Powell*, 6 Wheaton, R. 119; *Williamson* v. *Doe*, 7 Blackf. R. 12; *Matter of Faulkner*, 4 Hill, 598.

But it is said, that although the attachment was void, the bond is valid. After the issuing of the attachment, the party proceeded against applied to the Judge for an order to discharge the warrant, which was granted on executing the bond in suit, which was duly acknowledged and approved. Under such circumstances, does the bond fall with the other proceedings?

The plaintiff contends that the defendants are estopped from denying the issuing of a valid attachment, because it was recited in the bond that an attachment was issued.

Love v. *Kidwell*, (4 Blackf. R. 553,) cited by the plaintiff's counsel, was debt on an attachment bond. The declaration set out the condition of the bond, which, after reciting that Kidwell, one of the defendants, had issued a writ of foreign attachment against the plaintiff, stipulated that if Kidwell should prosecute his said writ, &c., against Love to final judgment, and pay all damages that might be sustained by him, provided the proceedings should be wrongful and oppressive, then the bond to be void. One of the pleas interposed was, that no writ of attachment ever issued, to which plaintiff demurred. The Court said; "The plea that no writ of attachment was ever sued out is bad, because it denies a fact which is admitted to have existed by the condition of the bond, which is set out in the declaration. The plaintiff had a right to avail himself of the estoppel by demurrer. It is not necessary to reply that matter, where it appear by the previous pleading." In that case, it will be observed, the bond was given by the party suing out the attachment, and he would have no right to question its validity. If it had been void, he would have been liable on the bond for the injury done in suing out void process. There the bond was for the protection of the person proceeded against; here it was given to the attaching creditor or for his benefit. There, it was voluntarily given; here it was *in invitum*. It would have

been no defence to the former bond that a valid writ of attachment had not issued; and the question whether a writ had issued, not going to the validity of the bond itself, the defendant was estopped by the recital.

The case cited from Blackford is like that of *Bowne* v. *Miller*, (6 Hill, 496,) where an action was maintained in an attachment bond given by the party procuring a void attachment. The Court said, "Bowne, who procured the attachment, was not at liberty to show the irregularity for the purpose of defeating the action."

It is undoubtedly a well settled rule, that a party who has executed a deed is thereby estopped from disputing not only the deed itself, but every fact which it recites. *Trimble* v. *The State*, 4 Blackf. R. 437; Cow. & Hill's Notes, 1430, 1460; 3 J. J. Marsh, 166; 4 Ib. 655; 7 Conn. R. 102. Thus the obligors, in an administration bond, were held estopped by the recital in the bond to deny the appointment of the administrator. *Cutler* v. *Dickinson*, 8 Pick. 386. But such is not the effect of a void bond. And if it happens that a fact misstated in the bond is the one which the defendant desires to prove for the purpose of establishing the invalidity of the bond, it cannot be that a defendant is remediless. If so, the statute of usury could be evaded by setting forth in the bond, that only seven per cent. was agreed to be paid. A bond, obtained by duress, could not be defended against, if it was set forth in the bond that it was voluntarily given. In short, every bond, however illegal the consideration, could be placed beyond the reach of controversy by a simple recital in its condition. This cannot be. I do not think a mere recital in a bond can be made to operate by way of estoppel so far as to preclude the obligors from showing the instrument void. Avoiding the deed, avoids also the estoppel.

Nor do I think the other positions assumed by the plaintiff's counsel are tenable. There was no *estoppel in pais*, Woodworth, by giving the bond, and applying to discharge the warrant, did nothing to mislead the attaching creditor, nor did the latter take any steps affecting his rights in

consequence of the giving of the bond. *Wallis* v. *Truesdell*, (6 Pick. 455.) I think also there was no *waiver* of the jurisdictional defect. The Judge had no jurisdiction, and Woodworth did no act to confer any. A trespass had been committed by levying on his property under void process, and he, acting on the defensive, could not procure its release, except by complying with the former prescribed by law. He therefore executed the bond, and the assumed power of the officer over the property ceased.

In *Homan* v. *Brinckerhoff*, (1 Denio, 184,) a constable, upon an attachment, which was void because no sufficient bond had been given, seized property which was claimed by a stranger, who procured the same to be given up, upon executing the bond required in such case. 2 R. S. 231, § 33. And it was held that the plaintiff, being a trespasser in taking the property, could not maintain an action on such bond. There is no distinction in principle between that case and the one now before us. The decision in that case was put on the broad ground, that an action could not be maintained on a bond given to obtain the liberation of property illegally taken. If there was an *estoppel* or a *waiver* in one case, there was in the other also.

In the matter of *Faulkner*, (4 Hill, 598,) the affidavits on which a foreign attachment issued, were insufficient to confer jurisdiction. The debtor applied to the Supreme Court to set aside the attachment and all subsequent proceedings. It appeared that trustees had been appointed, and the debtor had previously applied for, and had a hearing in the Common Pleas, pursuant to 2 R. S. p. 9, § 43. But the Court held, that these constituted no waiver of his right to have the proceedings set aside as void. Bronson, J. said, "This was not a proceeding *in personam*, or an action where a voluntary appearance would be sufficient to confer jurisdiction over the person, although not regularly served with process. It was a proceeding *in rem*, and the debtor only came in to save his property. It was not a case where there could be any such as a technical appearance. See per Parsons, C. J. in *Bissell* v. *Briggs*, 9 Mass.

R. 469; *Pawling* v. *Bird*, 13 Johns. 192, 207; Cowen & Hill's Notes, 908, 1024. He undertook to prove he was not an absconding or concealed debtor, for the purpose of having the warrant discharged. But I do not see how that could confer jurisdiction on the Judge who had previously issued the warrant."

In *Broadhead* v. *McConnel*, (3 Barb. Sup. Court Rep. 175,) a defendant was arrested and brought before an officer under the 4th section of the act to abolish imprisonment for debt, and to punish fraudulent debtors. The affidavits on which the warrant issued were insufficient, and the defendant objected to the jurisdiction of the officer on that ground. That objection being overruled, the defendant proceeded to controvert the facts and circumstances on which the warrant was issued, and afterwards, to prevent being imprisoned, gave his bond with sureties, as provided in the 10th section of said act. It was held, that he was not estopped from denying the officer's jurisdiction, nor from setting up his want of jurisdiction as a defence to the action on the bond.

The giving of the bond, then, could not have the effect to confer jurisdiction, when, as in this case, there was a total want of it. The bond is a part of the attachment proceedings, and must stand or fall with it. The officer having no right or jurisdiction to issue the attachment, it follows, of course, that he had no right to take the bond.

I do not put this decision upon the ground that the bond was void under 2 R. S., 286, § 59, as being taken *colore officii*. It has been held that that provision applies only to securities executed to the officer, and not to those taken to and for the benefit of the parties suing out the process. *Ring* v. *Gibbs*, 26 Wend. 510; 3 Greenl. 161; 8 Id. 426; 5 Mass. 541; Id. 314; 7 Id. 101. Though in the *People* v. *Meighan*, (1 Hill, 298,) a bond taken by a Justice of the Peace, in a prosecution for bastardy, and containing in addition to the provisions required by law, others imposing further obligations on the obligor, was declared within the statute, and adjudged void, being taken *colore officii*.

This bond would be void independent of any such statu-

tory provision. There being no jurisdiction, there was no attachment; the levy was a trespass, and the taking of the bond wholly unauthorized. In *Olds* v. *The State*, (6 Blackf. R. 91,) a Justice of the Peace, without any authority by law, appointed a constable and took his bond with surety for the discharge of his duties. The appointment and bond were adjudged void. So in *Commonwealth* v. *Jackson's Ex'rs.* (1 Leigh, 485,) the Hustings Court of Williamsburgh, without authority of law for the act, appointed a collector of the public taxes for the city, and took his bond with surety for due collection, &c. The Court of Appeals held the bond not valid and obligatory as to the surety at least. In neither of these cases were the bonds taken to the officer, or Court appointing, or for their benefit.

There should be judgment for defendants on both demurrers, with leave to the plaintiff to amend on payment of costs.

Recent English Decision.

Court of Queen's Bench.—Sittings in Banc after Michælmas Term. — December 18, 1849.

Jenkins *v.* Brown and others.

C. & Co., merchants at New Orleans, bought corn as agents for plaintiff, but with their own money, and shipped it, taking a bill of lading, by which the cargo was deliverable to their own order. C. drew bills of exchange on plaintiff, and indorsed them to defendants for value, and delivered the bill of lading to them as a security for the payment of the bills, and gave them a power of selling the cargo if the bills should not be paid. Afterwards C. sent the invoice, with notice of the bills of exchange, and a letter of advice, to plaintiff. When the bills, which had been deposited with the bill of lading by defendants at their bankers' in London, became due, plaintiff tendered payment of them; but, as they were accidentally mislaid on that day, the payment was not received, and plaintiff was desired to wait until the following morning. On that day, and since, plaintiff was unable to take up the bills: *Held*, in an action of trover, that a special property in the cargo passed to defendants when the bill of lading was delivered to them as a security, to which the general property of plaintiff in the cargo was subject; and that the offer of plaintiff to pay,

and the request by the bankers of a day's delay, did not discharge plaintiff from his duty to pay the bills before his right to the possession of the cargo attached.

TROVER for a cargo of corn. Pleas — first, not guilty; second, not possessed. On the trial, before Erle, J., at the Liverpool Summer Assizes, in 1848, it appeared that Messrs. Clingender & Co., merchants at New Orleans, bought the corn in question with their own money, but by the direction of, and as agents for, the plaintiff; they shipped the corn in their own names, taking from the captain of the ship a bill of lading, which was dated the 8th April, deliverable to their own order. They drew bills of exchange on the plaintiff for the price of the corn, at thirty days after sight, payable at Messrs. Smith, Payne & Co.'s, bankers in London; and, according to the universal practice in America of buying bills, instead of discounting them, they sold them to the defendants, and with them delivered to them the bill of lading. It was agreed that the corn should remain with the defendants as a security for the payment of the bills, and that the defendants should reimburse themselves all expenses, by a sale of the cargo, if the bills were not paid at maturity. Afterwards Messrs. Clingender & Co. sent an invoice and a letter of advice, with notice of the bills of exchange, to the plaintiff. The bills, which had been accepted by the plaintiff, became due upon the 17th June; they had been deposited with the London bankers of the defendants, and were then in their hands. When the clerk of the plaintiff called to receive the bill of lading, and to take up the bills of exchange, he was told that the documents had been mislaid, but that if he would call on the following day they should be got ready for him, and he might have them: he went away without paying the bills, and on the 18th the plaintiff was unable to take them up, and they remained unpaid. The defendants subsequently sold the corn. The learned Judge was of opinion that the plaintiff never had property in the cargo, and directed a verdict for the defendants. In the following Michaelmas term,

Watson obtained a rule nisi for a new trial, on the ground of misdirection; against which, in Michaelmas Term, 1849,*

Martin and *Cowling* showed cause. — The plaintiff had no property in the corn. Messrs. Clingender & Co. intended to reserve the property in it until the bills of exchange accepted by them were paid by the plaintiff; and there is nothing to show that the property passed from them. The question is, not whether a right of lien has been divested by a tender, but whether the property in the corn has passed. Assuming that the sale of personal property may be liable to a condition, the condition in this case has not been performed: the plaintiff ought to have made an unqualified payment in order to divest the property out of the defendants, and to vest it in himself. In *Wait* v. *Baker* (2 Exch. 1), and *Van Casteel* v. *Booker* (Id. 691, 708), it was held, that the fact of making the bill of lading deliverable to the order of the consignor, was decisive to show that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods until he did a further act.

Watson and *Overend*, contra. — Where a foreign merchant purchases goods abroad as agent for an English merchant, and appropriates a particular cargo to the English merchant, which he adopts, the property vests in him, subject to the lien of the foreign merchant from the time when it is shipped on board. [ERLE, J. — The bill of lading is, in law, the cargo, and that being deliverable to the order of the consignor, is a consignment of the cargo to himself.] If there had been a loss at sea, it would fall upon the plaintiff. The bills of exchange, accepted by the plaintiff, were the price of the corn, and the tender of payment of them divested the lien of the defendants. When the defendants became the holders of the bill of lading, they stood in the place of Messrs. Clingender & Co. [WIGHTMAN, J. — The payment of the bills is a condition precedent. There might,

* Nov. 2 and 3, before Coleridge, Wightman, and Erle, JJ. Lord Denman, C. J., was absent on account of ill health.

perhaps, be a special action against the defendants or the bankers for not being ready with the bills.] There was no privity of contract between the defendants and the plaintiff. In *Wait* v. *Baker* (2 Exch. 1), the defendant, who was the principal, had never accepted the cargo, nor assented to the invoice. Suppose goods pawned, and deliverable on a certain day, and a tender of the money was made, but by accident they were not produced. [WIGHTMAN, J. — Do you say that no excuse for the non-delivering of the bills of lading would be sufficient? COLERIDGE, J. — Suppose the principal was out, and his clerk said that the party might have them as soon as he returned.] Negligence in the bankers, who were the agents of the defendants for the purpose of receiving a tender, makes the tender tantamount to payment. The laches of the person who claims the right of lien, and is bound to have the goods ready to be delivered, divests the lien. A right of lien is discharged by tender. *Scarfe* v. *Morgan*, 4 M. & W. 270; *Stevenson* v. *Blakelock*, 1 Mau. & S. 535; *Cowell* v. *Simpson*, 16 Ves. 275; *Crozer* v. *Pilling*, 4 B. & C. 26. And if a right of lien is once gone, the act of the other party cannot revive it; it is not necessary, as in the case of a plea of tender, that the party should be always ready with the money. *Cur adv. vult.*

COLERIDGE, J., now delivered the judgment of the Court. — This case involved the question, whether the defendants had a right of property in some corn, or only a right of lien upon it.

It appeared that Messrs. Clingender & Co. bought the corn in question as agents for the plaintiff; but they paid for it with their own money, and therefore it became their property. It was afterwards shipped by them, and the cargo continued their property. There is no evidence of any intention that the property in the corn should pass, and the taking the bill of lading deliverable to their own order is conclusive that it did not pass. By delivering the bill of lading to the defendants as a security for the payment of the bills of exchange drawn on the plaintiff, and indorsed

to the defendants for value, and giving them a power of sale in case the bills should not be paid, a special property in the cargo passed to them. By sending the invoice, with notice of the bill of exchange and letter of advice, to the plaintiff, Messrs. Clingender & Co. passed to him a general property in the cargo, subject to the special property of the defendants. Under this arrangement the plaintiff's right of possession in the corn would not arise until the bills were paid. On the day of maturity the plaintiff tendered payment of the bills, but, as they were accidentally mislaid on that day, the payment was not received, and the plaintiff was desired to wait until the following morning. He was not then, and has not since, been able to take up the bills.

Upon these facts the plaintiff contended that the defendants have no interest in the cargo beyond a lien for the amount of the bills, and that such lien was discharged by the offer of their amount; and that thereby the plaintiff is entitled to demand possession of the cargo without payment, and, upon a refusal to deliver it to him, to maintain trover.

But we think that the defendants had a special property in the cargo when the bill of lading was delivered to them as a security. We also think, that the offer of the money on the one hand, and the request on the other hand of a day's delay before receiving it, did not amount to a sufficient offer and refusal, and did not discharge the plaintiff from his duty to pay the bills before his right to the possession of the cargo attached. The law is clearly laid down in *Wait* v. *Baker* (2 Exch. 1), and *Van Casteel* v. *Booker* (Id. 691), with which we entirely agree.

It follows, that the verdict for the defendants was right, and the rule must be discharged. — ***Rule discharged.***

Abstracts of Recent English Decisions.

Court of Chancery.

Cross v. *Sprigg*, May 18, 1850. *Obligor and Obligee — Discharge of Surety — Compromise with Creditors.* The obligor in a bond became involved to an extent greater in amount than his property. In a compromise with his trade creditors, he undertook to pay them 11*s.* in the pound, and the obligee, who was a relative of the obligor, guaranteed the payment of the 11*s.* in the pound to the trade creditors, and at the same time promised the obligor to deliver up the bond to him to be cancelled. The creditors accepted this compromise. The bond was not delivered up to be cancelled, and the obligor died: *Held*, that the effect of the obligee joining in the compromise with the creditors of the obligor, was to discharge the sureties in the bond, as it amounted to a giving of time to the obligor, it being impossible for the obligee to have withdrawn himself from the arrangement, and have disappointed the creditors, by the demand of his bond debt. — *Cross* v. *Sprigg*.

Rolls Court.

Liability of Railroad Directors. March 8, 1850. A bill was filed by a shareholder in London, Brighton, and South-Coast Railway Company, on behalf of himself and the other shareholders of that company, against the Directors of the Company, and also against the London and Portsmouth Railway Company, alleging that the directors of the former company had improperly purchased shares in the latter company, and paid cash in respect thereof, out of the funds of the company; and seeking to have the monies so expended replaced by the directors individually, and by the London and Portsmouth Company: *Held*, on demurrer by the London and Portsmouth Company, that they were properly made parties to the suit, and that the suit could be maintained for the recovery of the money, by a shareholder, suing on behalf of himself and others.

Salomons v. *Laing*, 14 Jur. 471.

Vice-Chancellor of England's Court.

Remoteness — Accumulative Directions. Jan. 16, 1850. A testator directed a settlement to be made to certain uses, so far as the rules of law and equity would permit; he then gave certain estates to trustees for

2000 years, and, subject thereto, to certain of his sons and their issue, in settlement; and he directed the trustees of the time to pay to any child of his body or the issue of such, who should for the time be entitled to the rents of the estates, and who having attained his age of twenty-one years, should be under his age of twenty-five years, an annuity, and to receive and accumulate the surplus. He then directed his trustees, during the minority of any person entitled to the actual possession of the estates, to apply a competent part of the rents and profits to the maintenance of such person, and invest and accumulate the residue, and he made the accumulations a fund to be resorted to for the payment of debts: *Held*, that the trusts for accumulation were void. — *Scarisbrick* v. *Skelenersdale*, 14 Jur. 562.

Vice-Chancellor Wigram's Court.

Sale of Ship — Lien on Proceeds. February 7, 1850. In 1841, transactions took place between the plaintiffs and A., the registered owner of a ship, and his partners, upon the result of which the plaintiffs claimed a lien, for a debt due to them from A. and his partners, upon the proceeds of any sale that might be made of the ship, and her cargo and freight. A. and his partners afterwards transferred the vessel, and freight and cargo to B., who registered himself as owner, and then transferred her with cargo &c. to C., who placed his name on the registry as owner. The plaintiffs then filed their bill, alleging that B. and C. had notice of their claim, that they had paid no consideration, and that the transfers were the result of a fraudulent scheme to defeat the plaintiff's right of lien; and praying that a bill of sale of the ship, cargo, &c. might be executed to the plaintiffs, or that the same might be sold under the direction of the Court, and the plaintiff declared entitled to a lien on the proceeds; or if the transfers and sales to B. & C. should be held to have deprived the plaintiffs of their claim upon the ship, freight and cargo, or either of them, then they might be declared entitled to a lien for their debt, on the nominal and ostensible considerations given for the freight, ship and cargo. The plaintiffs, having failed to prove the alleged fraud, the bill was dismissed, with costs, at the hearing, so far as it related to the ship, on the ground that any equity the plaintiffs might have to attach the purchase-money of the ship in the hands of a purchaser, could extend only to purchase-money in the hands of an immediate registered transferee from A., and not to purchase-money in the hands of any subsequent purchaser (with or without notice of the plaintiff's claim) from such immediate transferee. The question of the property in the cargo and freight was sent to be tried in an action at law, with certain admissions.

Semble, that there is no reason, arising out of the policy of the ship registry acts, why a creditor of the registered owner should not be allowed to claim the proceeds of the ship in the hands of a purchaser from such registered owner. — *McCalmont* v. *Rankin*, 14 Jur. 474.

Court of Queen's Bench.

Money had and received. Jan. 23, 1850. In an action for money had and received, the particulars of demand were — "Cash received by defendant of D. on plaintiff's account, being 10*s.* in the pound on a debt of £52 5*s.* at one time due from plaintiff to defendant, and which had been previously paid by plaintiff to defendant: *Held*, that plaintiff was not bound by his particulars to prove a payment to defendant of £52 5*s.*, but was at liberty to show that the debt was settled, after deducting trade allowance or discount, by payment of a smaller sum. Letters making a demand on the defendant, which he did not answer, but in an interview with the writer gave an unsatisfactory account of the demand made in them, are admissible against him, though they contain statements of facts showing how the demand arose. — *Gaskill* v. *Skene*, 14 Jur. 597.

Mistake of Law — Excess of Jurisdiction. Feb. 26, 1850. Where the defendant, a Judge of a Court of Record, *bonâ fide* believing that he had jurisdiction, but so believing, through mistake of the law and not of the facts, committed, without jurisdiction, the plaintiff to gaol for fourteen days: *Held*, that he was liable in an action of trespass for false imprisonment; for although the Judge of a Court of Record is not answerable, at common law, in an action, for an erroneous judgment, or for the act of any officer of his court, wrongfully done, not in pursuance of, though under color of, a judgment of the Court, yet he is liable in an action for an act done by his command and authority, when he has no jurisdiction. *Houlden* v. *Smith*, 14 Jur. 598.

Sale — Warranty of Title. Defendant having bought goods at a sale, under an execution by the sheriff for £18, plaintiff, who had equal knowledge with defendant of the sale and of the title to the goods, bought from defendant his purchase for £23. The goods were afterwards claimed and taken under a superior title, and plaintiff was prevented from keeping possession: *Held*, that there was no warranty of title by defendant, and that plaintiff could not recover back his money as paid on a consideration which had failed.

But a purchaser has a right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid. — *Chapman* v. *Speller*, 14 Jur. 652.

Sale of Goods — Statute of Frauds. May 31, 1850. There may be an acceptance and receipt of goods sufficient to make a contract for the sale of goods valid within the meaning of the statute of frauds, without the buyer having examined the goods, or done any thing to preclude him from contending that they do not correspond with the contract. — *Morton* v. *Tibbett*, 14 Jur. 669.

Court of Common Pleas.

Patent — Specification — Misrecital of Title of Patent — Pleading. Feb. 25, 1850. A patent was granted, with a title, "for certain improve-

ments in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." The specification enrolled recited a patent with a title which differed from the title of the patent, by the insertion of the words "therein and" between the words "used" and the words "when transmitting;" and in the body of the specification it appeared that the patentee claimed an improved mode of manufacturing an apparatus used in *making* gas, as well as improvements in apparatus for measuring gas: *Held*, that the patent was void, inasmuch as the specification described a different and more extensive invention than that for which the patent was granted. *Held*, also, that this obligation might be taken either on a plea that the patentee did not particularly describe the nature of the invention, or, on a plea that the invention described was not the invention for which the letters patent were granted. — *Croll* v. *Edge*, 14 Jur. 553.

Landlord and Tenant — Evidence of a Surrender. May 22, 1850. The defendant, who was a tenant to T., a bankrupt, sent the key of the premises to the office of C., the official assignee under T.'s bankruptcy, where it was given to C.'s clerk, with information to what premises it belonged. The defendant immediately quitted possession, and the key was never returned, but there was no other evidence of any assent by C. to the determination of the tenancy: *Held*, in an action by the assignees for subsequently accrued rent, that the above facts did not amount to a surrender of the tenancy by operation of law. — *Cannan et al.* v. *Hartley*, 14 Jur. 577.

Livery Stable Keeper — Lien — Veterinary Charges. April 23, 1850. A livery stable keeper who employs, at the request of the owner of a horse, a veterinary surgeon to attend the horse whilst standing at livery, has no lien on such horse for the charges of such veterinary surgeon. — *Orchard* v. *Rackstraw*, 14 Jur. 605.

Pleading — Settlement of Accounts on Cross Demands. May 1 and June 24, 1850. To assumpsit against the acceptor of bills of exchange, amounting to £900, it is a good plea, that after the accruing of the causes of action, the defendant and plaintiff accounted together of and concerning the said causes of action, and other claims and demands of the defendant against the plaintiff; and that, upon such accounting, £50 and no more was found to be due from the defendant to the plaintiff, which sum the defendant then promised to pay the plaintiff on request; and that the defendant thereupon paid to the plaintiff the sum of £50 in satisfaction of such sum so due to the plaintiff as aforesaid. — *Callander* v. *Howard*, 14 Jur. 672.

Court of Exchequer.

Banker's Cheque. April 25, 1850. Debt lies against the maker of a banker's cheque, by the payee, to whom he has delivered it. — *Simpkins* v. *Pothecary*, 14 Jur. 464.

Evidence — Award. June 1, 1850. In an action for goods sold and delivered; to which the defendant pleaded the general issue, payment, and a set-off: *Held*, that a statement by a witness that he heard the plaintiff say that the claim which formed the subject-matter of the action had been referred to arbitration, and that there had been an award against him, was admissible as evidence under the general issue. *Murray* v. *Gregory*, 14 Jur. 555.

Miscellaneous Intelligence.

The Attorney General's Prerogative. The Attorney General of Great Britain was recently requested by certain parties to file an information against the Commissioners of Woods and Forests, to restrain the erection of buildings in Hyde Park for the great Industrial Exhibition of 1851. The Attorney General refused, assigning the following reasons: —

"I have in this matter a duty of a judicial nature to perform. The object of the information is to call in question the exercise of the discretion of the Woods and Forests in the management of a part of the property of the Crown. The information states that what the Commissioners of Woods and Forests are about to do is illegal, and injurious to the public. The information states no facts which, in my opinion, establish either of these propositions. But even if there were a question as to the legality, the Attorney-General is bound to judge whether it is for the interest of the public to litigate the question. Cases may be conceived, and, indeed, not unfrequently arise, in which the letter of the law has been violated, and in which the Court has, nevertheless, required the Attorney-General to consider whether he would allow an information to proceed complaining of such violation, even where the Attorney-General had already, in his discretion, allowed the information to be filed, and where, if the information had proceeded, the Court could have done no other than enforce the strict right. The discretion of the Attorney-General is interposed to prevent this mischief; and his exercise of that discretion is purely an exercise of a judicial function, and as such I have exercised it to the best of my ability.

"In the present case the sense of what is for the interest of the public, with relation to what the Commissioners of Woods and Forests propose to do, has been unequivocally expressed by a vote of the House of Commons. It would, in my opinion, be an improper measure, on the part of the Attorney-General, if, in the exercise of his discretion, and acting on behalf of the public, he were to sanction a proceeding directly at variance with that vote. If any private right were affected by my decision, it would be a different matter; but I have the satisfaction of knowing that no private right of any individual or individuals can be withdrawn from the consideration of any Court, or in any manner affected by my refusal to sanction this information."

Sir Robert Peel's Influence on English Law.—This eminent individual, whose untimely end has led to so general an expression of feeling chiefly in respect of his political services, has taken too considerable a part in the modern amendment of our jurisprudence to be passed over by us, who can have no direct or immediate concern with his general merits as a statesman.

He was in truth one of the greatest friends to codification — the digesting of the law — but within a narrow compass and on a somewhat limited scale. He saw the inconvenience of having the criminal law on any given subject, scattered over some scores of statutes, several of which related entirely to one branch of that law, but many more only touched it in one or two of their numerous enactments. He therefore caused to be digested in one act, all the enactments relating to one offence; as, for example, larceny or offences against the person, and thus gave great relief to the practitioners as well as to the Judges by the consolidation. The same process had frequently before been applied to the revenue law, in its different branches, with a success that well warranted this further measure of consolidation. The Larceny Consolidation Act (7 & 8 Geo. 4, c. 29) has seventy-seven sections, and occupies but ten pages of the quarto Statute Book. It is in some respects negligently done: for example, the offence of sending threatening letters has been found so imperfectly described that Mr. Justice Holroyd had to direct an acquittal, on the ground that the words in s. 8, "demanding with menaces," might apply to any letter threatening an action. So in another consolidation act, that respecting offences against the person, (9 Geo. 4, c. 31,) the offence of polygamy (commonly and inaccurately called bigamy) is intended to be reënacted as in the original statute of Jac. 1, and yet the exception of a divorce by sentence of the Ecclesiastical Court is by carelessness omitted. The exception in the statute of Geo. is confined to cases of sentences of nullity and divorces by act of parliament, cases wholly unnecessary to be provided for, inasmuch as the offence is in them not at all committed. Sir R. Peel brought in two other bills during the year 1827,— one for consolidating the laws relating to malicious injuries to property; the other, those relating to remedies against the hundred. We note these things to show how great care should be applied to the process of digesting, and how utterly impossible it is that one person, however qualified, can perform the work. There must be several, and we require in this department, above every thing, a responsible minister of justice. We may add that Sir R. Peel's consolidations never went beyond the digesting of statutory provisions. Common law he left untouched.

Great, however, were these exertions at that time, and they were accompanied by another good service; the severity of the criminal code was considerably mitigated. Whoever may feel disposed to criticise the improvements thus effected on account of their being on too limited a scale, should reflect on the time and the circumstances. For when Lord Eldon bore sway in the Lords, and the party which Sir R. Peel represented in the Commons were adverse to all change, it was a very considerable act

to propound any measures of legal amendment. The opening of the year 1828 began a new era, and since Lord Brougham's full statement, and Lord Lyndhurst's adoption of the measure by issuing Commissions on the address then moved and unanimously agreed to by the Commons, such a course of law amendment has been pursued, that lawyers before deceased, if they revisited the scene of their labors, would not believe that they were in a country governed by the English law as they had known and practised it.

We have already said, that only as a law amender does Sir R. Peel come within our jurisdiction. But it would be improper were we to leave wholly short, and, as it were, truncated, our notice of his history. He certainly affords a very rare example of a party chief, so often changing the ground of his political opinions; and on this peculiarity, turn both the panygeric and the blame of which he has been the subject. All persons who hold the opinion, that the currency ought to have been reformed suddenly without any preparation, — without any investigation of its injustice, — without giving the debtors who had borrowed, including the State, in depreciated money, any relief from the severe obligation under which they were placed in 1819, to repay in good money, — the public, for instance, which had borrowed six hundred millions against repaying eight hundred millions, — all these rigid disciples of the economical school lauded their new and powerful convert; while they who, with far more sense of justice and more practical wisdom, held that the pound should have been fixed at fifteen or sixteen shillings, regarded this great measure as rather a great spoliation than a great improvement. In like manner, Sir R. Peel's chief claim to public confidence, having for half his life rested on his protection of the Established Church against the Catholic claims, and having in the capacity of such champion been chosen member for Oxford University, the Protestant party regarded with abhorrence his being the minister to bring in and to carry the emancipation of the Catholics — a measure of perfect justice and sound policy, only too long delayed.

The third act of change was, however, more distasteful to his adherents than either of the former, — his *conversion* to the repeal of the Corn-laws. The Conservative party had become reconciled to him after the measure of 1829, by his strenuous and most able though vain opposition to the Reform Bills of 1831 and 1832. The Corn-law and its defence was the main ground of his success in overturning the Ministry of 1841. When he retraced his steps on this ground, his former changes, in 1819 and 1829, were again recalled to the recollection of his party, and they were never more to be reconciled or mitigated towards him. He made to his principles, — they said, and we think erroneously said, to his fears or his love of popular applause, — the greatest sacrifice on record, as made by any party leader. He was repaid by the bitter hostility of his former allies, and also by the marvellous hostility of his adversaries. For he, having broken with his friends because he came over to his enemies, those enemies joined those friends, and ejected him from office, on the

occasion of his proposing a measure of Irish coercion, which they themselves, his enemies, had devised. They opposed both their new ally, their convert, and themselves, in turning him out and seizing upon his place. We ascribe no blame; we censure no one; we simply record the fact.

Of Sir R. Peel's merits as a man of business, it would be difficult to speak too highly. He was an accomplished administrator. We know but one (Sir J. Graham) who can be placed higher, or, indeed, by his side. As a speaker, if by that we mean a parliamentary debator, he stood also among the first. His statements were clear and accurate; his judgment in the selection of topics excellent; his temper ever under command; his readiness, both in reply and on an interruption, (though less here, where it is more difficult,) was great; and his manner, though not of the most winning or graceful, well suited the fabric of his discourse. As to impassioned declamation, or overpowering argument, or happy sarcasm, or playful wit and humor, he made no pretence to them; and so his rank among orators is not in the first, but at the top of the second class. He was as good a speaker and as powerful a debater as any minister needs be, even in difficult times.

As a statesman, his place is nearly the same. His gradual weaning from his original opinions, leads to but a moderate estimate of his genius; and yet he had great practice in such changes. On the Corn-law question it clearly should have taken place many years before it even appears to have been approached. So, when he became so much of a political economist, in 1818 and 1819, as to take up the very extreme bullion doctrines, surely it was strange that a quarter of a century should elapse before he leant towards the principles of Free Trade. But his steady and zealous resistance to Parliamentary Reform is yet more extraordinary, and seems to be entirely forgotten by the reformers of the present day; who, in paying honors to his memory, forget his whole life except its last act.

There is one cardinal defect in his character which it would be foolish to pass over: his views and his feelings all circulated round the centre of himself. He was a perfect Peelite. The effects of the attacks made on him by the anti-bullion party, can be plainly traced in many of his speeches, and some of his measures after 1819. But those fiercer assaults on him, from far higher quarters, in 1846, had a more fatal and much more discreditable influence on his public conduct. His ruling motive, ever since that period, was to prevent any change by which the Protectionist party might reënter office; for he dreaded their undoing his Corn-law policy. The worst effect of this conduct was its making him support the very worst measure the Whigs ever brought forward, — the lowering the Sugar Duties, and thereby increasing to an enormous amount the execrable African Slave Trade. Had he plainly stated to himself that to the feelings of resentment against his former partizans, or of alarm about his own glory as a free-trader, he was making so frightful a sacrifice, he would have started back shuddering from the contemplation of his own image. But, unhapily, men under the influence of passion or

of selfish prejudice, never open their eyes to the plain truth; and hence the errors into which they so often fall.

His leaving a desire, sure to operate like a command, that no peerage should be taken by his family on account of his services, is a singular illustration of the same foible in his character. No one can suppose that he deemed the honors shared by Walpole, Chatham, Nelson, Hardwicke, Wellington, other than the object of a just ambition, — other than compatible with an honest love of true glory. Such a supposition would be extravagantly unfair to Sir R. Peel's memory. But still, his deliberately exempting himself from a class of men so illustrious, does seem to betoken a wish to appear above what all other men desire, and, at any rate, to claim for his own conduct a praise of disinterestedness somewhat exaggerated and romantic. Great as were his merits, important as were the services he rendered, no one can for a moment place him on a level so high as this would seem to do. — *London Law Review.*

We have been favored with copies of the Address of the Bar to Sir Robert Peel upon his retiring from office in 1835, and of the letters which passed on that occasion. They will, we think, be interesting to our readers: —

"We, the undersigned, members of the English Bar, beg leave to express to you our sincere admiration of the wisdom, temper, and firmness which you have displayed in the administration of His Majesty's Government.

"We deeply regret the necessity which has compelled your retirement from office, and anxiously hope that the country will not long be deprived of those services which we believe to be essential to its prosperity and security.

"The absence from London of many of our members on professional business, has alone prevented us from offering to you at an earlier period this expression of our sentiments."

405 Signatures; viz.

King's Serjeants 3, King's Counsel 26, Serjeants-at-Law 6, Barristers 370, — 405.

Copy Letters from Sir Charles Wetherell and Sir Robert Peel, accompanying the above Address of the Bar.

"My dear Sir Robert,

"I have the pleasure of transmitting to you an Address from the Bar, signed by upwards of 400 gentlemen, resident in London, including, as you will perceive, a large proportion of the most distinguished members of all ranks in the profession.

"On this occasion I will merely say, that the eminent talents, judgment and prudence, which you have displayed in conducting the government, as the First Minister of the Crown, and, above all, your firmness in maintaining the principles essential to the security of the Established Church, have called forth this marked expression of their sentiments from that learned and independent body.

"You will, I have no doubt, receive it as a sincere tribute of respect, which they consider (especially at the present moment) as due to your public character and services.

"I remain, my dear Sir Robert, most faithfully yours,

(Signed) CHARLES WETHERELL."

"5, Stone Buildings, April 27th, 1835."

"*Whitehall Gardens, April 28th*, 1835.

"MY DEAR SIR CHARLES,

"Allow me to return, through you, the honored instrument of communication through which the Address of the Bar has reached me, the cordial and respectful acknowledgments of my gratitude for the high honor which it confers.

"If I had retired from office with the painful consciousness that I had failed in the defence of the trust assigned to me through any want of devotion to the service of the King, through impatience under defeat, or the apprehension of any difficulty or danger, not connected with public interests, the return to private life, accompanied by such a retrospect, would have been a grievous disappointment to me.

"But when I am assured by the distinguished men who are parties to this address, who have been spectators of the contest in which I have been engaged, and are eminently qualified to form a judgment on the motives and conduct of all who have taken a part in it, that, notwithstanding failure, I have established a claim on their approbation and confidence, I retire with a reward, so far as personal ambition is concerned, higher than any other to which success could have entitled me.

"I trust that the tenure of power by the late Administration, short as it was in duration, has not been without great public advantage, by satisfying a large and most respectable portion of the community that it is possible to combine with the maintenance of ancient institutions, with the respect for established rights, with the independent exercise of a free judgment by all constitutional authorities, — that it is possible to combine with these the redress of real grievances, the correction of acknowledged abuses, the pure administration of public patronage, and a wise economy in the control of the public expenditure.

"If we have contributed to establish and confirm such a conviction in the public mind, we shall not have labored in vain; for we shall have provided the strongest of all securities against reckless innovation, and against changes in our laws and institutions that may be calculated rather to serve the temporary interests of political parties, than to conduce to the enlarged and permanent ends of good government.

"Believe me, my dear Sir Charles, most faithfully yours,

"ROBERT PEEL.

"Sir Charles Wetherell, &c. &c. &c."

TRADES MARKS. — We take the following extracts from a late number of the *London Jurist*. They relate to the right to use and monopolize *trades* marks.

The Subject-matter. — One of the main elements which determines commercial profit or professional remuneration, is the quality which arises out of a long course of integrity and skill, and is known as "character, goodwill, reputation, connection," &c. For the protection of this, if attached to the person, no aid is required from law: Mr. Smith will hardly succeed in persuading the customers that he is Mr. Jones. And if it be of a real nature, it is inseparable from a particular spot — a favorite shop or tavern, for instance; and movable articles are in some cases equally secure. The work of an old painter may "reject the claim of every other hand," and the flavor of the wine may identify the very spot on the bank of the Rhine, which produced it. Failing, however, this natural cognoscibility, the genuine nature of the commodity is usually guaranteed by an artificial symbol — a trades mark.

This applies especially to chemical productions: metals and metallic manufactures, iron and tin, knives and ploughshares are among the cases recorded; culinary sauces, tea, cigars, dyes, and especially medical preparations — the latter with reference, be it observed, to the druggist or vendor, not the inventor or author of the prescription. See *Clark* v. *Freeman*, 12 Jur. 149, and some remarks in the Law Mag., No. 81, p. 236. But the efficacy of the mark applies to any article of which a buyer is unable to verify the source, to which he gives a well-founded or fanciful preference. The wider the distance between producer and consumer, the less chance is there of personal identification: marks, therefore, come very much into play in exportation; and there are many anecdotes of travellers finding themselves preceded in their most advanced explorings, by articles bearing the trades mark of the English factory. A public conveyance has the same kind of good-will attached to it, and is identified by its external appearance, not personally or by locality. Hence the case of *Knott* v. *Morgan*, 2 Kee. 213. So, an establishment may be better known by its circulating advertisements and prospectuses, than the place where it is carried on. See *The London and Provincial Law Assurance Society* v. *The London and Provincial Joint-stock Life Insurance Company*, 11 Jur. 938. Finally, we may mention the title of a book: this, indeed, is usually a copyright question, being only pirated along with the literary manufacture itself. An author's name, however, has been sometimes misappropriated to a spurious production: it might be thought that the intrinsic merits of a work were its recommendation, but the title-page, in fact, saves much critical examination; and even the name of the publisher who has purchased the work has its influence. "15*s.* for this little print; you mean 15*d.*," said the president to the printseller. "No, Sir Joshua; its price was 15*d.* yesterday, but your notice of it has altered its value." And as the name not only of an author, but of a periodical or a particular series, supposes identity at least of editorial selection and revision, it has occasionally been a subject of litigation. *Hogg* v. *Kirby*, 8 Ves. 215; *Keen* v. *Harris*, cit. 17 Ves. 338; *Seeley* v. *Fisher*, 11 Sim. 581.

General Nature of the Right. — The oldest case usually referred to under this head (*Southerne* v. *Howe*, 2 Roll. Rep. 26) was an action by a

buyer of cloth falsely marked — a branch of the subject which, in later cases, is only alluded to incidentally, probably because the injury to the buyer of a single article is as a fraction of that sustained by the counterfeited party from the piracy as a whole. The nature of the wrong to him is not left by the cases in a settled shape; most of them regard it as a fraud, as similar to the personation of another, or the assumption of an agency for him, (*Croft* v. *Day*, 7 Beav. 84,) and operating to "deprive him of profit, by attracting custom on false representations, lead the public to believe," &c. In *Knott* v. *Morgan* (2 Kee. 213) the same intention was relied on, and by similar means, both cases expressly repudiating the notion of a substantial specific right in the thing — "no property," "no exclusive right." *Crawshay* v. *Thompson* (4 M. & G. 357; 5 Scott's N. R. 562) went upon fraud, not allowing any weight to a claim, set up and published, to the use of a mark. And in *Day* v. *Day* (Eden on Inj. 314) there was said to be no exclusive right — a view of the question which coincides with the cases at law, which all profess to be for "deceit," and not "piracy." Nevertheless, we meet with some indications which seem to shadow out a right of property. *Canham* v. *Jones* (2 V. & B. 218) speaks by comparison of an invasion of another's "property" — an appropriation of the benefit of a valuable interest, in the nature of good-will, treating the false representation as the means employed to effect the injury. One judgment (*Millington* v. *Fox*, 3 My. & C. 338) only distinctly asserts the existence of the right. "No previous case," says Mr. Drewry, "had gone so far;" no subsequent case has, up to the present time, I believe, followed it; "but it was fully argued, and is one of the most careful and elaborate decisions of a cautious Judge." "It was very different," Lord Cottenham said, "from the usual cases — those of fraudulent use." There was evidence of a certain amount of innocent infringement of the mark, but which would "not deprive plaintiffs of their right to the exclusive use of it." And in *Morison* v. *Salmon* (2 M. & G. 385; 2 Scott's N. R. 449) it was said that the action might be to try a right; that it was like a patent — it might be assignable, or the subject of a license. Compare also *Delondre* v. *Shaw*, 2 Sim. 213.

It is submitted that the doctrine of property is the correct one; that the analogy is closer with patent inventions and copyright, which, though called "incorporeal," are definite subjects, than with personal reputation. The mark is not attached to any thing that has belonged to the party, but to a certain commodity for which he is noted, or a particular style of literature, as distinguished from his general intellectual faculties. In *Clark* v. *Freeman* the fraudulently affixing the name of a celebrated physician to a kind of pill, was said to be a case of defamation possibly, but not a case of trades mark, because a physician does not sell pills. It may be said that he sells prescriptions, but the pill vendor does not; so that the specific substance is still wanting. Just as, in *Martin* v. *Wright*, (6 Sim. 297), a diorama was held to be no piracy of an engraving.

The capability of development and expansion, which the notion of legal property admits of and requires to keep pace with the change of society, is

well seen in *Prince Albert* v. *Strange*, (13 Jur. 109; 1 Man. & G. 43); and it seems probable that fraud was at first had recourse to as the least obtrusive mode of placing this matter on the list of civil injuries. Viewed from the other aspect, it is precisely a *fraud* on the buyer, and it seemed an easy transition to put the same term on the wrong to the supplanted seller. It is a vague class of injury. "Nobody has been able to define fraud," said Lord Langdale, "it is so multiform." Primarily it implies falsehood (or concealment) practised on a party in communication, and to that meaning it would advantageously have been restricted. Trades-mark cases are analogous to those frauds only where the right of an absent or third party is affected; the creditor of a vendor, for instance, as to whom there is neither *suggestio falsi* nor *suppressio veri*, whose property is as it were stolen, just as if his patent had been infringed on; and it will be observed, that the imitation of the mark blends imperceptibly with that of the invention or copyright, under which head it is often entered in the digests and treatises. — It is presumed, and for the credit of the law hoped, that an alien is entitled to full protection on this head, (*Pisani* v. *Lawson*, 8 Scott, 182; 6 Bing. N. C. 30,) notwithstanding the still unsettled state of alien copyright. An English manufacturer, it is said, is so secured in the United States.

Form of Marks. — Trades marks were described in one case as names, titles, insignia, devices; in another, names, letters, indiciæ; and again, as forms, words, symbols, and accompaniments. They are impressed on the article itself, attached to the vessels or covers that contain it, or employed for cards and prospectuses, liveries, &c.; or the entire form, or color and style of the commodity, or its envelope, may constitute the mark. A name or an inscription is often relied on, and sometimes the form of the letters and arrangement of the printing is characteristic, the visible form being often recognised in foreign countries, where the meaning is unintelligible, just as, in former times, the rarity of the accomplishment of reading led to a sign for every shop. Thus "W C" on iron was said to be known abroad as the comb-mark. The form may be simple, the article or substance allowing, perhaps, only of a single letter, or a particular species of shape; or, on the other hand, the mark may amount to a little ornamental design — an idea apparently referred to in *Delondre* v. *Shaw* (2 Sim. 213), where the maker of a chemical drug marked it with his cross of honor and a serpent, the emblem of his profession; and we sometimes see a crown or the regal initials used, to denote the patronage of royalty. An *original* or new mark obtains in America an express protection, on the footing of a patent, for seven years; a similar privilege being, by our Designs Act, for some very excellent but inscrutable reason, expressly withheld from a design for a label, wrapper, or other covering, which it classes with immoral designs. It has been stated that a very considerable sum is expended on gold marks and labels for linen exported to the American market.

Notices of New Books.

A TREATISE ON INSURANCE. By BALTAHZAR MARIE EMERIGON. Translated from the French, with an Introduction and Notes, by SAMUEL MEREDITH, Esq. London: Henry Butterworth, 7 Fleet Street, Law Bookseller and Publisher. Boston: Charles C. Little and James Brown. 1850.

A TRANSLATION of Emerigon will be hailed with pleasure by every commercial lawyer in America. The Treatise which bears his name has so long been known and respected by all who are interested in insurance law, that it is a work of supererogation to say any thing relative to its eminent author. It is only remarkable, that a work which has been recognised as of standard authority for seventy years, should never before have been presented to English and American lawyers in their vernacular tongue. This task has now been most acceptably performed by Mr. Meredith. He has done more than this. He has prefaced his translation with an ably written Introduction, in which he gives an interesting biography of Emerigon, and describes the state of the law at the time of the publication of the original treatise. Although this may lack interest to the mere *case lawyer*, it will be read with great interest, by all who are fond of the literature of the law, and those, who desire to trace, in the jurisprudential systems of the other countries, the operation and application of the familiar principles of our own law.

We have been so much interested by Mr. Meredith's translation and additions, that we have promised ourselves the pleasure in a future number of examining the work much more at length, and also of devoting considerable attention to his biographical and other researches.

A TREATISE ON THE PRACTICE OF COURTS OF ADMIRALTY IN CIVIL CAUSES OF MARITIME JURISDICTION: WITH AN APPENDIX, CONTAINING RULES IN THE ADMIRALTY COURTS OF THE UNITED STATES, AND A FULL COLLECTION OF PRACTICAL FORMS. By ANDREW DUNLAP, Attorney of the United States for the District of Massachusetts. Second Edition, with Notes and Additions, by SAMUEL FALES DUNLAP, Counsellor at Law. New York: Jacob R. Halsted, Law Bookseller, No. 2, Wall Street. 1850.

WE are glad to announce a reprint of Dunlap's Admiralty Practice. The present edition contains the whole matter published in the first edition, together with notes of later cases, and a large amount of new matter, consisting of Statutes, Court Rules, &c. in the Appendix. The collection of Forms, which was so much valued in the first edition, has been retained. It is unnecessary to say more of the practical value of the work.

Obituary Notice.

The papers recently announced the death of Samuel M. Burnside, Esq., of Worcester, at the age of sixty-seven. He was so long connected with the profession, that something more than a mere passing notice is due to his memory.

He was born in Northumberland, New Hampshire, and was descended from that hardy and intelligent race, some of whom, after emigrating from Scotland to Ireland, early made their way into New Hampshire, and settled in and around Londonderry. The early part of his life was spent at home, in what was then a comparatively new settlement, and it was at schools that he found there that he principally acquired his preparatory education to fit him for college. He was graduated at Dartmouth in 1805, and for two years was employed in teaching an Academy in Andover.

In 1807, he entered the office of the late Chief Justice Ward, and continued to pursue the study of the law under his direction, with great assiduity, until his admission to practice, in March, 1810. As a rare exception to what was then the general rule of the Court, he was admitted, upon examination, at once to practice in the Supreme Court.

He first opened an office in Westboro', soon after his admission to the bar, and remained there until the succeeding autumn, when he removed to Worcester, where he ever afterwards resided.

He was always a close and attentive student, and early acquired the reputation of a learned lawyer. He was familiar with the *black letter* learning of the profession, and at home in the mazes and subtleties of special pleading, which he always regarded and pursued with pleasure as a study. He maintained a high rank at the Bar for legal attainments, and so long as he continued in practice commanded a respectable, and at times an extensive business. Nor were his studies confined to books or topics of his own profession. He cultivated his knowledge of the classics, and retained his knowledge for these during his life. He was for many years placed upon committees for examining the classes in Harvard University in Latin; and the faithfulness and devotion with which he performed that duty is familiar to all connected with that institution.

Although he was often called to places of trust and responsibility, he had little to do with politics or public life. He was, one year, a member of the legislature in the popular branch, and it was to his exertion, chiefly, that the Commonwealth owed the "school law" of 1827.

He had always taken an interest in the prosperity of common schools, and often served with great fidelity upon school committees in the town in which he resided. He thereby became familiar with the wants of the community in this respect, and the result was the reduction to an uniform system of the various and almost inconsistent enactments which had been passed from time to time in the progress of legislation upon the subject.

In whatever he engaged, he was faithful and unremitted in the performance of his duty, sparing neither time nor labor for the purpose. For the

few last years of his life he had withdrawn from the practice of the law, but his interest in its study, especially in respect to any new publications in that department, continued lively and active till the last.

He married a daughter of the late Hon. Dwight Foster, of Brookfield, formerly a Senator in Congress, and left two daughters.

He was among the few with whom professional was united with pecuniary success in life, and he died leaving a competency to a most deserving family.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Allen, Abraham	Fall River,	August 23,	David Perkins.
Baker, Wm. R.	Millbury,	" 19,	Henry Chapin.
Bates, James	E. Bridgwater,	" 9,	Welcome Young.
Beatley, Spencer	Chelsea,	" 30,	John M. Williams.
Burnham, Utley	Deerfield,	" 6,	D. W. Alvord.
Clough, Josiah R.	Lynn,	" 28,	John G. King.
Copeland, Wm. H.	Bradford,	" 30,	John G. King.
Crosby, Isaac N.	Medway,	" 28,	Francis Hilliard.
Dane, Rufus	Springfield,	" 31,	George B. Morris.
Davis, Gilman & partners	Charlestown,	" 12,	Asa F. Lawrence.
Dexter, John	Danvers,	" 20,	J. G. King.
Durgin, Jonathan	Milton,	" 26,	Francis Hilliard.
Fernald, David L.	Boston,	" 14,	John M. Williams.
Ferree, Henry A.	Springfield,	" 10,	George B. Morris.
Field, Eugene	Charlemont,	" 19,	D. W. Alvord.
Fiske, Emmons H.	Watertown,	" 5,	Asa F. Lawrence.
Gammons, Jarius	Middleborough,	" 5,	Welcome Young.
Haggerston, David	Boston,	" 7,	John M. Williams.
Hamilton, Henry W.	Northampton,	" 8,	Myron Lawrence.
Hapgood, N. R & partners	Worcester,	" 2,	Henry Chapin.
Hobbs, Robert L.	Roxbury,	" 10,	F. Hilliard.
Jordan, Dedreck	Reading,	" 31,	Asa F. Lawrence.
Joy, Lewis E. & partner	Worcester,	" 2,	Henry Chapin.
Keith, James	Greenfield,	" 1,	D. W. Alvord.
Lanckton, Wm. C.	Springfield,	" 10,	George B. Morris.
Leland, Benjamin W.	W. Brookfield,	" 3,	Henry Chapin.
Mahrs, James B.	Medway,	" 23,	Francis Hilliard.
McLean, George	Boston,	" 14,	John M. Williams.
Newton, Lincoln	Braintree,	" 12,	Francis Hilliard.
Page, Eben S.	Groveland,	" 3,	John G. King.
Phelps, Albert	Lynn,	" 30,	John G. King.
Prouty, Isaac T.	E. Brookfield,	" 28,	Henry Chapin.
Raymond, Nahum J.	Winchendon,	" 30,	Henry Chapin.
Rafter, John	Boston,	" 26,	John M. Williams.
Reed, Dana & partner	Charlestown,	" 12,	Asa F. Lawrence.
Richards, Lewis et al.	Sharon,	" 30,	Francis Hilliard.
Robbins, Morton	Bridgewater,	" 9,	Welcome Young.
Rollins, Alonzo S.	Springfield,	" 7,	George B. Morris.
Streeter, Oscar	Melrose,	" 19,	Asa F. Lawrence.
Taylor, Orin & partners	Charlestown,	" 12,	Asa F. Lawrence.
Thompson, C. V. H.	Coleraine,	" 10,	D. W. Alvord.
Thompson, Charles	Coleraine,	" 10,	D. W. Alvord.
Thompson, Hollis	Coleraine,	" 10,	D. W. Alvord.
Tifft, Thomas	Millbury,	" 22,	Henry Chapin.
Wheeler, Mason	Fitchburg,	" 28,	Henry Chapin.
White, Barney L.	Newton,	" 9,	Asa F. Lawrence.